Supreme Court, U. S.
FILED
MAR 15 1976
MICHAEL RODAK, JR., CLERK

In The

Supreme Court of the United States

October Term, 1975

No. 75-1323

JOSEPH M. MC CRANE, JR.,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

EDWIN P. ROME
THOMAS A. BERGSTROM
Attorneys for Petitioner

Of Counsel:
BLANK, ROME, KLAUS & COMISKY
1100 Four Penn Center Plaza
Philadelphia, Pennsylvania 19103
(215) 569-3700

(9319)
LUTZ APPELLATE PRINTERS, INC.
Law and Financial Printing
South River, N.J. (201) 257-6850 | New York, N.Y. (212) 563-2121 | Philadelphia, Pa. (215) 563-5587 | Washington, D.C. (202) 783-7288

TABLE OF CONTENTS

Page

Opinions Below 2

Jurisdiction 2

Questions Presented 2

Constitutional and Statutory Provisions Involved 4

Statement of the Case 5

1. Procedural History Before the District Court. 5

2. The Opinion and Judgment of the Court of Appeals. 8

Reasons For Granting the Writ 10

I. The court below disregarded controlling decisions of this Court and failed to apply the harmless error doctrine as enunciated in *Chapman v. California.* . 10

II. The court below misinterpreted controlling decisions of this Court and deprived petitioner of the full protection of his Fifth Amendment right to due process of law as enunciated in *Brady v. Maryland* and its progeny. 15

Contents

Page

III. The court below disregarded controlling decisions of this Court and deprived and denied petitioner the full protection and benefit of his Fifth and Sixth Amendment rights..... 18

IV. The decision of the Court of Appeals in affirming petitioner's convictions on Counts III and IV, sanctions such a departure from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision. 20

Conclusion 22

TABLE OF CITATIONS

Cases Cited:

Benton v. Maryland, 395 U.S. 784 (1969) 15

Brady v. Maryland, 373 U.S. 83 (1963) .....
..... 2, 3, 7, 8, 10, 13, 15, 16, 17, 18, 19, 20, 21

Brown v. Illinois 422 U.S. 590 (1975) 17, 18

Brown v. United States, 411 U.S. 223 (1973) 15

Chapman v. California, 386 U.S. 18 (1967) .....
.....2, 3, 9, 10, 11,13, 15, 20

Contents

Page

Davis v. Alaska, 415 U.S. 308 (1974) 2, 19

Douglas v. Alabama, 380 U.S. 415 (1964) 19

Giglio v. United States, 405 U.S. 150 (1972) 2, 3, 7, 16, 18

Kotteakos v. United States. 328 U.S. 750 (1946) 13, 14

Levy v. Parker, 478 F.2d 772 (3d Cir. 1973), rev'd on other grounds, 417 U.S. 733 (1974) 15

Mesarash v. United States, 352 U.S. 1 (1956) 15

McNabb v. United States, 318 U.S. 322 (1943) 21

Pointer v. Texas, 380 U.S. 400 (1965) 19

Schneble v. Florida, 405 U.S. 427 (1972) 15

Smith v. Illinois, 390 U.S. 129 (1968) 19

United States v. Agurs, 510 F.2d 1249 (D.C. Cir. 1975), cert. granted, 44 U.S.L.W. 3304 (1975) 18

United States v. Banks, 383 F. Supp. 389 (1974) 18

United States v. Cantone, 426 F.2d 902 (2d Cir. 1970) 15

Contents

Page

United States v. DeMarco, Crim. No. 75-1129-F (C.D. Cal. Opinion filed November 10, 1975) 18

United States v. Hale, 422 U.S. 171 (1975) 21

United States v. Harris, 462 F.2d 1033 (10th Cir. 1972) 18

United States ex rel. Hetenyi v. Wilkins, 348 F.2d 844 (1965) 15

United States v. House, 524 F.2d 1035 (3d Cir. 1975) 15

United States v. Nobles, 422 U.S. 225 (1975) 21

United States v. Rosner, 516 F.2d 269 (2d Cir. 1975), cert. pending, 44 U.S.L.W. 3284 (1975) 18

United States v. Stevenson, 409 F.2d 354 (7th Cir. 1969) ... 15

Statutes Cited:

18 U.S.C. 2 .....5, 6

18 U.S.C. 371 5

26 U.S.C. 7206(2) 2, 4, 5, 6

28 U.S.C. 1254(1) 2

Contents

Page

United States Constitution Cited:

Fifth Amendment 3, 4, 9, 15, 17, 18, 19, 20, 22

Sixth Amendment 3, 4, 17, 18, 19, 20, 22

Rule Cited:

Federal Rules of Criminal Procedure, Rule 8a 16

APPENDIX

Appendix A — Order Dated February 4, 1976 ..... 1a

Appendix B — Order Dated January 26, 1976 ..... 2a

Appendix C — Judgment of the United States Court of Appeals Dated February 11, 1976 ..... 3a

Appendix D — Order Dated January 15, 1976 ..... 5a

Appendix E — Opinion of the United States Court of Appeals Dated October 31, 1975 ..... 7a

Appendix F — Judgment of the United States Court of Appeals Dated December 18, 1975 ..... 20a

Contents

Page

Appendix G — Memorandum of the United States District Court Dated May 13, 1975 ..... 22a

Appendix H — Order Dated May 13, 1975 ..... 69a

In The

Supreme Court of the United States

October Term, 1975

No.

JOSEPH M. MC CRANE, JR.,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Petitioner, Joseph M. McCrane, Jr., prays that a writ of certiorari issue to review the opinion and judgment of the Court of Appeals for the Third Circuit in these proceedings on December 18, 1975.

OPINIONS BELOW

On May 13, 1975, Judge William J. Nealon of the United States District Court for the Middle District of Pennsylvania, filed an opinion and order denying petitioner's motions for judgment of acquittal and new trial. The opinion and order of the Court dated May 13, 1975 are printed at Appendices G and H hereto, *infra,* pp. 22a-69a. On December 18, 1975, the Court of Appeals for the Third Circuit affirmed petitioner's convictions on Counts III and IV and vacated the convictions on Counts X and XI and remanded those matters for a new trial. The opinion and judgment of the Court of Appeals are printed as Appendices E and F hereto, *infra,* pp. 7a-22a.

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

QUESTIONS PRESENTED

Petitioner was ultimately convicted of four counts of aiding and assisting in the preparation of false income tax returns in violation of 26 U.S.C. §7206(2), seven other counts having been disposed of by the District Court's order granting a motion for judgment of acquittal at the close of the government's case. The Court of Appeals for the Third Circuit found a deliberate advertent violation by the government of the *Brady-Giglio* doctrine, but chose only to vacate and remand those two counts which it deemed were "affected," thereby totally disregarding this Court's decisions in *Chapman v. California,* 386 U.S. 18 (1967) and *Davis v. Alaska,* 415 U.S. 308 (1974).

In this context, the questions presented are these:

1. Where, on appeal from conviction, the government is found deliberately to have violated a defendant's Fifth Amendment rights by the advertent suppression of *Brady-Giglio* impeachment evidence resulting in the vacation of convictions on two counts, may the convictions on the remaining two counts of a multi-count indictment nevertheless be affirmed consistent with *Chapman v. California* without assessing whether the government's gross misconduct and the denial of defendant's constitutional rights was "harmless beyond a reasonable doubt" with respect to the effect of the suppression of evidence on the affirmed convictions on the remaining two counts?

2. Was petitioner denied his Sixth Amendment right to full and effective cross-examination contrary to *Davis v. Alaska* by the government's deliberate advertent suppression of *Brady-Giglio* evidence, which made the suppressed impeachment evidence unavailable during cross-examination of a key government witness?

3. Does the effective protection of the due process rights guaranteed by the Fifth Amendment require the dismissal of an indictment where the government, by deliberate advertent suppression of *Brady-Giglio* impeachment evidence, intentionally misled the District Court in stating there was *no* such evidence, thereby securing the denial of petitioner's motion for production of *Brady* material?

4. Should this Court, pursuant to its supervisory powers, require the automatic dismissal of an indictment where it is found that the government deliberately violated the petitioner's

Fifth and Sixth Amendment rights by advertent suppression of *Brady-Giglio* evidence?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the Fifth and Sixth Amendments to the Constitution of the United States, which provide in relevant part:

> "Fifth Amendment.
>
> No person shall be . . . deprived of Life, Liberty or Property, without due process of law . . . .
>
> Sixth Amendment.
>
> In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him . . . ."

This case involves Section 7206(2) of the Internal Revenue Code of 1954, 26 U.S.C. §7206(2), which provides as follows:

> "§7206. Fraud and false statements
>
> Any person who—
>
> (2) Aid or assistance.—Willfully aids or assists in, or procures, counsels, or advises the preparation or presentation under, or in

> connection with any matter arising under, the internal revenue laws, of a return, affidavit, claim, or other document, which is fraudulent or is false as to any material matter, whether or not such falsity or fraud is with the knowledge or consent of the person authorized or required to present such return, affidavit, claim, or document . . . .
>
> * * *
>
> shall be guilty of a felony and, upon conviction thereof, shall be fined not more than $5,000, or imprisoned not more than 3 years, or both, together with the costs of prosecution. Aug. 16, 1954, c. 736, 68A Stat. 852."

STATEMENT OF THE CASE

1. Procedural History Before the District Court.

On May 24, 1973, petitioner Joseph M. McCrane, Jr., was indicted in the District of New Jersey on an 11-count indictment alleging violations of Title 18, United States Code §§ 371 and 2 and Title 26, United States Code 7206(2).

Count I charged a conspiracy among petitioner, four unindicted co-conspirators and others involving a common scheme and design to defraud the United States by aiding and assisting several taxpayers to prepare false income tax returns by furnishing fictitious invoices, enabling them to disguise political contributions as business expenses and subsequently deducting these contributions on their income tax returns.

Counts II through XI[1] charged petitioner with ten substantive violations of 26 U.S.C. §7206(2) and 18 U.S.C. §2. Petitioner's trial[2] before the Honorable William J. Nealon and a jury, began on December 2, 1974 in the United States District Court for the Middle District of Pennsylvania.

At the conclusion of the government's case, the District Court granted petitioner's motion for judgment of acquittal with respect to the conspiracy count, Count I, and six of the ten substantive counts, Counts II and V-IX, of the indictment. On December 11, 1974, the jury returned a verdict of guilty on each of the four remaining substantive counts, namely: Counts III, IV, X and XI.

E. Lawrence Bellante ("Bellante"), Chief Executive Officer of the architectural and engineering firm of Bellante, Claus, Miller & Nolan, Inc. ("Bellante firm") was an immunized key government witness at trial. After petitioner's conviction, petitioner's attorneys discovered that prior to the commencement of petitioner's first trial in Newark, New Jersey on September 10, 1974, the United States Attorney for the District of New Jersey had sent favorable letters on behalf of Bellante and the Bellante firm to certain state agencies with

1. The nature of the offenses described in these counts are identical to that described in the conspiracy count and all are inextricably intertwined. Indeed, the substantive counts were all alleged to have been committed pursuant to the plan, scheme and purpose to commit the conspiracy.

2. Petitioner's first trial began on September 10, 1974 in Newark, New Jersey. Following selection of a jury and the presentation of most of the government's evidence, the District Court granted defendant's motion for a mistrial on the ground of prejudicial publicity. Petitioner's second trial began in the District of New Jersey on October 21, 1974. Again, the trial was aborted on the ground of prejudicial publicity. Petitioner's motion for change of venue was granted.

which Bellante and/or the Bellante firm had a contractual relationship.[3] Notwithstanding petitioner's repeated timely requests for *Brady* material, and a clear and specific direction of the District Court compelling disclosure of all such *Brady-Giglio* evidence,[4] the government deliberately suppressed the evidence

3. Seven of the letters were written before trial and one after trial but before the disposition of defendant's post-trial motions, as follows:

1. June 18, 1973 to John C. Kohl, Commissioner of the New Jersey Department of Transportation;

2. June 21, 1973 to John L. Swink, Senior Vice President and Treasurer of Rutgers University;

3. July 5, 1973 to the New Jersey Sports and Exposition Authority;

4. July 5, 1973 to Milton H. Gelzer, Esquire;

5. July 13, 1973 to Donald S. Howard, President of the Board of Education of the Borough of Rumson, New Jersey;

6. October 16, 1973 to William W. Watkin, Jr., Executive Director of the Delaware River Port Authority;

7. January 8, 1974 to Richard C. Walters, Assistant Counsel, Department of the Navy;

8. January 31, 1975 to Robert G. Donovan, President of the Pennsylvania Society of Professional Engineers (NE Chapter).

4. During the hearing held on April 9, '1974 on petitioner's pre-trial motions in the District of New Jersey, the Honorable Lawrence A. Whipple, in response to the petitioner's *Brady* request, inquired of the U. S. Attorney if any such evidence was available.

"The Court: Anything that you say — you say you have nothing at all, right?

Mr. Goldstein: Right.

(Cont'd)

of the arrangement with Bellante and perpetrated a fraud on the District Court. A motion for a new trial based upon the government's suppression of *Brady* material was denied by the District Court.

2. The Opinion and Judgment of the Court of Appeals.

On December 18, 1975, a panel of the Court of Appeals for the Third Circuit affirmed petitioner's convictions on Counts III and IV vacating only the convictions on Counts X and XI and remanding those counts for a new trial. In its opinion, written by Judge Weis, the Court of Appeals stated (8a).

> "Letters written by the United States Attorney to prospective customers of a key government witness constituted *Brady* material which should have been disclosed to the defendant in this criminal case. The failure of the prosecution to do so *requires a new trial on the affected counts.*" (Emphasis added.)

In vacating the convictions on Counts X and XI and remanding for a new trial, the Court of Appeals determined that

---

(Cont'd)

The Court: Nothing at all involving *Brady* material, right?

Mr. Goldstein: Nothing."

The Court then stated to government counsel:

> "If there is anything of a questionable nature, you should put aside and let me review *in camera* and I'll decide." (Vol. 1, pp. 44a-45a of Appendix to Brief below).

At the time of the above referred to hearing, seven of the eight letters had been sent.

the suppressed evidence was material. The court below held that the suppressed evidence affected the credibility of one of the government's key witnesses. The court below agreed that the suppressed evidence went directly to a matter reasonably likely to affect the judgment of the jury. The court below pointedly concluded that the government's conduct in withholding the evidence was advertent and therefore *deliberate* and *intentional.* The court stated (15a).

> ". . . the trial was not one which owed its imperfection to negligence or inadvertence. To the contrary, *this is a situation where the prosecution chose to ignore the sage admonition of the pretrial judge and took it upon itself to decide a serious legal question adversely to the defendant.*" (Emphasis added.)

Having found a *deliberate* suppression of *Brady* material by the government resulting in the intentional denial to petitioner of due process, the Court of Appeals nevertheless erroneously concluded that this denial affected only Counts X and XI.

Despite its recognition that the government had deliberately denied petitioner his due process rights guaranteed by the Fifth Amendment, the court below usurped the jury's function, apparently speculating that the suppressed evidence would not have affected the judgment of the jury on Counts III and IV. In affirming petitioner's convictions on Counts III and IV of the indictment, the court below made no mention at all of the controlling legal standard enunciated in this Court's decision in *Chapman v. California,* 386 U.S. 18 (1967).

Petitioner filed a timely petition for rehearing and suggestion for hearing in banc, which was denied January 15, 1976. The government filed a timely petition for rehearing on January 26, 1976 which was denied by order dated February 11, 1976. These perspective orders are printed at Appendices C and D, *infra,* pp. 3a-6a.

On January 21, 1976, petitioner filed a motion for stay of mandate pending application to this Court for a writ of certiorari, which stay the Court of Appeals granted by order dated January 26, 1976, printed at Appendix B, *infra,* p. 2a.

On February 3, 1976, petitioner made application to this Court for an extension of time in which to file a petition for writ of certiorari, said application having been granted on February 4, 1976, printed at Appendix A, *infra,* p. 1a.

REASONS FOR GRANTING THE WRIT

I.

The court below disregarded controlling decisions of this Court and failed to apply the harmless error doctrine as enunciated in *Chapman v. California.*

The District Court entered judgments of acquittal on seven of the eleven counts of the indictment including the conspiracy count, based upon the insufficiency of the government's evidence. The Court of Appeals found that two of those remaining counts (X and XI) were tainted due to the government's deliberate suppression of *Brady* material directly relating to the credibility of a key witness for the government.

In affirming the convictions on Counts III and IV, the Court of Appeals, impliedly holding that the government's deliberate advertent suppression of evidence was "harmless error" as to those counts, disregarded this Court's admonition in *Chapman v. California,* 386 U.S. 18, 23 (1967) "that before a Federal Constitutional error can be held harmless, *the court must be able to declare a belief that it was harmless beyond a reasonable doubt.*" (emphasis added). In the instant case, the court below did not and could not conclude that the government's gross misconduct was "harmless beyond a reasonable doubt."

Each of the counts in the indictment was alleged to be part of an overall scheme or plan. The government's theory of the case was specifically predicated on the contention that petitioner's alleged illegal activities were part of an overall scheme or plan to aid and assist in the preparation of false income tax returns. In his opening address to the jury, government counsel stated (Vol. 1, pp. 103a-104a of Appendix to the Brief below):

> ". . . What is on trial is the role this defendant played in the operation of a scheme designed to raise contributions from certain business men in a way that violated the Internal Revenue laws, a scheme which enabled the corporations to disguise their political contributions as business expenses which they thereafter deducted unlawfully on their federal income tax returns, a scheme in some instances which even provided certain corporations with false invoices from

> advertising firms falsely indicating that the firm's political contributions were really business expenses; a scheme which we will prove to you, ladies and gentlemen, ultimately enabled those corporations to wrongfully deduct their political contributions as business expenses . . . ."

And again, during his summation, counsel for the government stated (Vol. 5, pp. 1434a-1435a of Appendix to Brief below):

> "I told you in our opening that we would present to you evidence that a scheme was created in the Spring of 1969 and the purpose of the scheme was to enable certain select business men to make their contributions by disguising those political contributions as business expenses . . . .I suggest to you that the evidence indicates overwhelmingly that this is precisely what occurred . . . ."

Cross-examination of Bellante, the government's key witness, on the basis of the suppressed letters, his arrangement with the prosecutor, and his motivation for testifying would thus obviously have had a dramatic impact on the jury's assessment of Bellante's testimony and on their judgment on those remaining counts. Had the government not deliberately suppressed this critical impeachment evidence, petitioner would not have been denied his right to cross-examine and confront the government's key witness on a critical premise of the government's theory at the trial. The Court of Appeals' attempt to fragment the indictment and to speculate without reference to

Chapman, on the effect of the unavailability of the suppressed *Brady* material is a usurpation of the function of the jury.

In *Kotteakos v. United States*, 328 U.S. 750, 763, 764 (1946), this Court stated:

> ". . .it is not the appellate court's function to determine guilt or innocence . . . .Nor is it to speculate upon probable reconvictions and decide according to how the speculation comes out. Appellate judges cannot escape such impressions. But they may not make them sole criteria for reversal or affirmance. . . .*Those judgments are exclusively for the jury*. . . ." (Emphasis added.)

The Court there went on to state the applicable standard, 328 U.S. at 764, 765:

> "It is rather what effect the error had or reasonably may be taken to have had upon the jury's decision. The crucial thing is the impact of the thing done wrong on the minds of other men, not on one's own, in the total setting . . . .*This must take account of what the error meant to them, not singled out and standing alone, but in relation to all else that happened.*" (Emphasis added.)
>
> "If, when all is said and done, the conviction is sure that the error did not influence the jury, or had but slight effect, the verdict and judgment

should stand, *except perhaps where the departure is from a constitutional norm . . . .*" (Emphasis added.)

Neither of these standards is satisfied here.

First, there is no question but that the government's deliberate suppression deprived petitioner of evidence with which he could have challenged the government's theory of common scheme and design; and

Second, the government's misconduct in this case in the language of *Kotteakos,* plainly qualifies as a "departure . . . .from a constitutional norm." It was a deliberate violation of petitioner's due process right which resulted in a grossly unfair, one-sided trial in which the jury was deprived of critical evidence necessary to a rational assessment of the credibility of one of the key government witnesses. Here, the government's gross misconduct clearly affected the petitioner's substantial rights and poisoned the entire proceeding. To hold on the cold transcript before it, that the evidence deliberately suppressed by the government in this case would not have affected the judgment of the jury on the remaining counts or, was "harmless beyond a reasonable doubt," ignores the vital impact of such evidence and the critical nature of cross-examination of Bellante when viewed against the government's theory at trial.

In view of the government's theory at trial, reasonable men could not disagree that the suppressed evidence and the cross-examination based on it would have affected the judgment of the jury on the remaining counts. The government's deliberate

suppression of *Brady* evidence and the resulting denial of cross-examination tainted the entire proceeding. It was not "harmless beyond a reasonable doubt." The court below erred in failing to give effect to the *Chapman* standard, and at a minimum, convictions on Counts III and IV plainly should have been vacated and remanded with directions to grant petitioner a new trial on those counts as well as Counts X and XI. ***Brown v. United States,*** 411 U.S. 223, 231-32 (1973); ***Schneble v. Florida,*** 405 U.S. 427, 430-32 (1972); ***Benton v. Maryland,*** 395 U.S. 784, 797-798 (1969); ***Mesarash v. United States,*** 352 U.S. 1, 14 (1956); ***United States v. House,*** 524 F.2d 1035 (3d Cir. 1975); ***Levy v. Parker,*** 478 F.2d 772, 797-99 (3d Cir. 1973), ***rev'd on other grounds,*** 417 U.S. 733 (1974); ***United States v. Cantone,*** 426 F.2d 902 (2d Cir. 1970); ***United States v. Stevenson,*** 409 F.2d 354 (7th Cir. 1969); ***United States ex rel. Hetenyi v. Wilkins,*** 348 F.2d 844, 864 (1965).

II.

The court below misinterpreted controlling decisions of this Court and deprived petitioner of the full protection of his Fifth Amendment right to due process of law as enunciated in *Brady v. Maryland* and its progeny.

Relying upon the flat statement made by the United States Attorney,[5] Judge Whipple denied the request for exculpatory evidence. No exculpatory evidence was turned over to Judge Whipple or later to Judge Nealon for review *in camera* or to defendant prior to any of the trials.

Unquestionably, the deliberate, advertent suppression of exculpatory evidence by the government is an error of

5. See footnote 4, *supra,* pp. 7-8.

constitutional magnitude requiring dismissal of the indictment. *Brady v. Maryland,* 373 U.S. 83 (1963); *Giglio v. United States,* 405 U.S. 150 (1972). In affirming petitioner's convictions on Counts III and IV, the Court of Appeals impermissibly fragmented the indictment in a fashion permitting the court to ignore the substantial unfairness and prejudice to petitioner from the unavailability at trial of the suppressed impeachment evidence.

The intentional advertent violation of a defendant's due process rights by the government is grave prosecutorial misconduct fully warranting and requiring dismissal of the indictment. No other remedy adequately protects the constitutional rights implicated in cases such as this involving a multi-count indictment. The crabbed fragmented approach of the court below permits the government a broad, unfettered ability to gamble for convictions by deliberate, unconstitutional suppression of critical evidence. The court below has, in effect, sanctioned the government's form of constitutional roulette by its failure to invoke the only remedy which would effectively secure petitioner's constitutional rights against deliberate violation by the government.

Where, as here, the government proceeds to trial on a multi-count indictment alleging similar offenses assertedly committed in the furtherance of a *common scheme or plan,* and thereby joined for trial pursuant to Rule 8a, F.R.Cr.P., according to the court below, the government has the green light selectively to suppress *Brady-Giglio* evidence with the solace that the Appellate Court will only vacate convictions on those counts which it determines may, in a very narrow sense be "affected." The vital rights guaranteed by the Due Process

Clause do not survive such myopic attempts at precision judicial surgery, which find no justification in any of this Court's decisions. Instead of giving effect to petitioner's due process rights and providing a remedy which effectively secures and protects those rights, the Court of Appeals below has guaranteed the government the best of the due process world. The government's perception of its obligation to disclose will be colored by the practical realization that its refusal to do so will have no profound effect on the overall proceeding. The government's temptation to suppress *Brady* evidence and thereby violate a defendant's due process rights is merely whetted, not thwarted, by the narrow holding below. Undeterred and conscious only of a minimal risk, the government will in its unfettered discretion elect to continue to violate the Constitution by suppressing *Brady* evidence.

In the recent case of *Brown v. Illinois,* 422 U.S. 590, 591 (1975), a case this Court stated "lies at the crossroads of the Fourth and Fifth Amendments," the deliberate violation of a defendant's Fourth Amendment rights and the resulting effect on his Fifth Amendment rights was explored. In suppressing the defendant's confession, which was the product of his illegal arrest, notwithstanding a full *Miranda* warning, this Court in discussing considerations of deterring governmental wrongdoing and preserving judicial integrity stated at 422 U.S. 599-600:

> "The Rule [Exclusionary Rule] is calculated to prevent, not to repair. Its purpose is to deter — to compel respect for the constitutional guaranty in the only effectively available way — by removing the incentive to disregard it."

Following the same sound deterrent approach, the respective district courts in *United States v. Banks,* 383 F. Supp. 389, 392 (D.S.D. 1974) and *United States v. DeMarco,* Crim. No. 75-1129-F (C.D. Cal. Opinion filed Nov. 10, 1975) have seen fit to *dismiss* the cause of action in cases involving deliberate *Brady-Giglio* violations. In marked contrast with the decision of the Third Circuit below, the Court of Appeals for the Tenth Circuit has refused to "inquire into the elusive question of actual prejudice affecting the result of a criminal prosecution" in cases involving deliberate suppression of exculpatory evidence. *United States v. Harris,* 462 F.2d 1033, 1035 (10th Cir. 1972).

The petitioner's Fifth Amendment rights, having been *deliberately* violated, the most effective deterrent sanctions are constitutionally mandated. See also, *United States v. Agurs,* 510 F.2d 1249 (D.C. Cir. 1975), *cert. granted,* 44 U.S.L.W. 3304 (1975) and *United States v. Rosner,* 516 F.2d 269 (2d Cir. 1975), *cert. pending,* 44 U.S.L.W. 3284 (1975).

III.

The court below disregarded controlling decisions of this Court and deprived and denied petitioner the full protection and benefit of his Fifth and Sixth Amendment rights.

As *Brown v. Illinois, supra,* "lies at the crossroads of the Fourth and Fifth Amendments," the instant case clearly lies at the crossroads of the Fifth and Sixth Amendments.

The unfettered right to full and intelligent cross-examination of the government's witnesses is a critical,

minimum ingredient of a fair trial. It is central to the very integrity of the fact-finding process in criminal prosecutions. If, in the instant case, the government, instead of suppressing the evidence, had *provided* petitioner with the crucial exculpatory *Brady* material and the District Court had thereafter erroneously deprived petitioner of the right to cross-examine the government's witness by using such impeachment evidence, unquestionably the error would require a new trial *on all counts.* This Court stated in *Davis v. Alaska,* 415 U.S. 308, 318 (1974) that the denial of "the right to effective cross-examination . . . would be constitutional error of the first magnitude and *no amount of showing of want or prejudice would cure it.*" (emphasis added). See also, *Smith v. Illinois,* 390 U.S. 129, 168 (1968); *Pointer v. Texas,* 380 U.S. 400 (1965); *Douglas v. Alabama,* 380 U.S. 415 (1964).

The fragmenting approach adopted by the court below plainly would not have been justified had the District Court erroneously foreclosed petitioner's cross-examination of this crucial and far-reaching issue affecting the credibility of a key government witness and going directly to the government's proof of common scheme and plan. Should the standards be any *less* when the government *deliberately* suppresses the evidence thereby denying the petitioner *both* his Fifth and Sixth Amendment rights?

This Court's decisions regarding this fundamental right mandate that no court take it upon itself to determine that the refusal to permit searching and extensive cross-examination on credibility, bias and interest of a key government witness would not have affected the judgment of the jury in their consideration of other similar and related counts. Such a sterile,

microscopic approach is inherently hostile to the rights secured by the Sixth Amendment and is contrary to controlling decisions of this Court.

IV.

The decision of the Court of Appeals in affirming petitioner's convictions on Counts III and IV, sanctions such a departure from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision.

The deliberate violations of the Fifth and Sixth Amendment rights illustrated in this case constitute a frontal assault by the government on the integrity of the judicial system and the notion of a fair trial. This Court should grant certiorari and exercise its supervisory powers over the lower federal courts to fashion an effective remedy for the protection of these rights. At a minimum, circumstances such as these require that the convictions on all counts of a multi-count indictment charging a common scheme be vacated and remanded for a new trial unless the lower courts are able to satisfy themselves that the unavailability of the suppressed impeachment evidence regarding a key government witness was "harmless beyond a reasonable doubt," viewing the impact of the constitutional error on the trial as a whole.

Quite apart from remanding for a proper application of the *Chapman* test to these facts, this Court should grant certiorari to consider whether serious governmental misconduct in the *deliberate* suppression of *Brady* material requires the further step of fashioning a *deterrent* remedy to protect the important Fifth and Sixth Amendment rights which ride in the balance here.

Because of the nature of the procedures for production of *Brady* material, a defendant and his counsel may *never* know that *Brady* material has been withheld by overzealous prosecutors. Because of the difficulty of detection of violation of these constitutional rights by the government, it is submitted that the more drastic remedy of automatic dismissal is the only appropriate remedy which will secure these rights.

This Court said in *McNabb v. United States,* 318 U.S. 322, 340 (1943):

> "Judicial supervision of the administration of criminal justice in the federal courts implies the duty of establishing and maintaining civilized standards of procedure and proof."

In the exercise of its supervisory powers, this Court should grant certiorari to establish and maintain such civilized standards of procedure to deal with deliberate governmental suppression of exculpatory evidence. See also, *United States v. Hale,* 422 U.S. 171 (1975) and *United States v. Nobles,* 422 U.S. 225 (1975).

CONCLUSION

Where, as here, the government has deliberately violated the petitioner's Fifth and Sixth Amendment rights, and the Court of Appeals failed to abide by the controlling decisions of this Court, it is respectfully submitted that this petition for certiorari should be granted to review the opinion and judgment of the Court of Appeals for the Third Circuit.

Respectfully submitted,

s/ Edwin P. Rome

s/ Thomas A. Bergstrom

Attorneys for Petitioner

APPENDIX A — ORDER DATED FEBRUARY 4, 1976

SUPREME COURT OF THE UNITED STATES

No. A-674

JOSEPH M. McCRANE, JR.,

Petitioner

v.

UNITED STATES

ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI

UPON CONSIDERATION of the application of counsel for petitioner(s),

IT IS ORDERED that the time for filing a petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including March 15, 1976.

s/ William J. Brennan, Jr.
Associate Justice of the Supreme Court of the United States

Dated this 4
day of February, 1976

APPENDIX B — ORDER DATED JANUARY 26, 1976

UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

No. 75-1643

UNITED STATES OF AMERICA

vs.

JOSEPH M. MC CRANE, JR.,

Appellant

(D.C. Criminal No. 74-180)

Pursuant to Rule 41(b) of the Federal Rules of Appellate Procedure, it is O R D E R E D that issuance of the certified judgment in lieu of formal mandate in the above cause be, and it is hereby stayed until February 14, 1976.

s/ Joseph F. Weis, Jr.
Circuit Judge

Dated: January 26, 1976

APPENDIX C — JUDGMENT OF THE UNITED STATES COURT OF APPEALS DATED FEBRUARY 11, 1976

UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

No. 75-1643

UNITED STATES OF AMERICA,

Appellee

v.

JOSEPH M. McCRANE, JR.,

Appellant

SUR PETITION FOR REHEARING

Present: SEITZ, *Chief Judge*, VAN DUSEN, ALDISERT, ADAMS, GIBBONS, ROSENN, HUNTER, WEIS and GARTH, *Circuit Judges*, and MARKEY, *Chief Judge of the Court of Customs and Patent Appeals*.

The petition for rehearing filed by

Appellee

in the above entitled case having been submitted to the judges who participated in the decision of this court and to all the other

Appendix C

available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied.

By the Court,

s/ Joseph F. Weis, Jr.
Judge

Dated: February 11, 1976

APPENDIX D — ORDER DATED JANUARY 15, 1976

UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

No. 75-1643

UNITED STATES OF AMERICA,

Appellee

v.

JOSEPH M. McCRANE, JR.,

Appellant

SUR PETITION FOR REHEARING

Present: SEITZ, *Chief Judge,* VAN DUSEN, ALDISERT, ADAMS, GIBBONS, ROSENN, HUNTER, WEIS and GARTH, *Circuit Judges,* and MARKEY, *Chief Judge of the Court of Customs and Patent Appeals.*

The petition for rehearing filed by

Appellant

in the above entitled case having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the circuit in regular active service,

Appendix D

and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied.

By the Court,
s/ Joseph F. Weis, Jr.
Judge

Dated: January 15, 1976

APPENDIX E — OPINION OF THE UNITED STATES COURT OF APPEALS DATED OCTOBER 31, 1975

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 75-1643

UNITED STATES OF AMERICA,
Appellee

v.

JOSEPH M. McCRANE, JR.,
Appellant

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF PENNSYLVANIA
(D.C. No. 74-180 Criminal)

Argued October 31, 1975

Before: GIBBONS, *Circuit Judge*, MARKEY,* *Chief Judge of Court of Customs and Patent Appeals* and WEIS, *Circuit Judge*.

Of Counsel:

J. Robert Lunney
Lunney & Crocco
New York, N.Y.

Edwin P. Rome, Esq.
Thomas A. Bergstrom, Esq.
Jerome R. Richter
Blank, Rome, Klaus & Comisky
1100 Four Penn Center Plaza
Philadelphia, Pa.
Attorneys for Appellant

* Sitting by designation.

John J. Barry, Esq.
Bruce I. Goldstein, Esq.
MaryAnne T. Desmond, Esq.
Assistant U.S. Attorneys

Jonathan L. Goldstein, Esq.
United States Attorney
Federal Building
Newark, New Jersey
Attorneys for Appellee

OPINION OF THE COURT

(Filed December 18, 1975)

WEIS, *Circuit Judge.*

Letters written by the United States Attorney to prospective customers of a key government witness constituted *Brady* material which should have been disclosed to the defendant in this criminal case. The failure of the prosecution to do so requires a new trial on the affected counts. Convictions will be affirmed on other charges of aiding the preparation of false income tax returns by deducting political contributions as business expenses.

The defendant was convicted on four counts of violation of 26 U.S.C. § 7206(2), which in general proscribes aiding or advising preparation of fraudulent income tax returns.[1] At the conclusion of the government's case, the court dismissed a conspiracy charge and six substantive counts.

At the trial, there was testimony that the defendant solicited political contributions in the course of his duties as finance chairman for a gubernatorial candidate. Fictitious invoices for advertising services were issued in some

1. The indictment was returned in the District of New Jersey. The first trial began on September 10, 1974, but the court declared a mistrial on September 19, 1974 because of prejudicial publicity. A second trial began in New Jersey on October 21, 1974; however, on the defendant's motion for change of venue, the court transferred the case to the Middle District of Pennsylvania.

instances to disguise the payments as business expenses which were then used as deductions on the contributor's income tax returns. This arrangement was effected through the cooperation of Writers Associates, a small public relations firm which the defendant had engaged to assist in his fund raising efforts. In addition to its customary advertising services, Writers agreed to receive campaign donations and, on some occasions, bill contributors for work which had not been performed.

Count III of the indictment was directed at a $2,000.00 contribution which Hialeah Race Course, Inc. made after receipt of Writers' fictitious bills for advertising. Hialeah later deducted the amount on its 1969 Federal Income Tax return as a business expense.

Count IV charged that Trap Rock Industries, Inc. had given a contribution of $15,000.00 to the campaign after Writers Associates had sent invoices for advertising services not rendered. A witness testified that, in soliciting the funds, the defendant had offered to supply fictitious bills from a public relations firm so that Trap Rock could deduct the contributions as a business expense.

Counts X and XI were based on payments made by Bellante, Clauss, Miller & Nolan, Inc. on separate occasions. Lawrence Bellante, president of the company, testified that in June, 1969 the defendant asked for a campaign contribution. In the course of the conversation, McCrane said that the payment should be made to Bofinger-Kaplan Advertising, Inc. in order to secure a tax deduction. Bellante made a payment of $3,500.00 to Bofinger-Kaplan and deducted part from the corporate income tax. A similar arrangement governed a $2,500.00 payment to Writers Associates.[2]

The defendant raises a number of diverse issues on appeal and we first address the most serious one, the withholding of *Brady* material.

2. For accounts of other disguised contributions during the same campaign, *see* United States v. Gross, 511 F.2d 910 (3d Cir.), *cert. denied*, 44 U.S.L.W. 3258 (U.S. November 4, 1975).

Appendix E

E. Lawrence Bellante was a key government witness against the defendant. Without his testimony there could have been no conviction on Counts X and XI. The guilty verdicts on these two counts, of necessity, demonstrated the jury's acceptance of his credibility.

The trial concluded on December 11, 1974. Four days later, an article appeared in the New Brunswick *Home News* describing the manner in which Bellante had secured a contract to participate in the construction of a new sports stadium in New Jersey. Reporting on an interview with Bellante, the article said:

> "Among those who have helped him, he said, is U.S. Atty. Jonathan Goldstein, who has written in his behalf."

The defense immediately brought the matter to the attention of the trial court which then conducted further inquiry. It was discovered that the U.S. Attorney's office had sent a number of letters describing Bellante's conduct in this case to various public and private organizations in New Jersey. The court then ordered production of the letters, eight in all. Six had been sent in the summer and fall of 1973, one in January of 1974, and the last one on January 31, 1975 (some six weeks after the trial concluded).[3] The letters, some of which were written at the

3. Seven of the letters were written before trial and one after trial but before the disposition of defendant's post-trial motions, as follows:

1. June 18, 1973 to John C. Kohl, Commissioner of the New Jersey Department of Transportation;
2. June 21, 1973 to John L. Swink, Senior Vice President and Treasurer of Rutgers University;
3. July 5, 1973 to the New Jersey Sports and Exposition Authority;
4. July 5, 1973 to Milton H. Gelzer, Esquire;
5. July 13, 1973 to Donald S. Howard, President of the Board of Education of the Borough of Rumson, New Jersey;
6. October 16, 1973 to William W. Watkin, Jr., Executive Director of the Delaware River Port Authority;
7. January 8, 1974 to Richard C. Walters, Assistant Counsel, Department of the Navy;
8. January 31, 1975 to Robert G. Donovan, President of the Pennsylvania Society of Professional Engineers (NE Chapter).

Appendix E

request of Bellante's attorneys and others at the request of the addressee, are substantially identical. The U.S. Attorney's office wrote that Bellante had been granted immunity and had cooperated with the grand jury. Included was the following paragraph:

> "This office brings these facts to your attention for your consideration as to whether Bellante, Clauss, Miller & Nolan, Inc., should be barred from further bidding on state work. On previous occasions we have expressed our concern that individuals that cooperate with the United States Grand Jury pursuant to a grant of immunity should not be penalized for telling the truth. It is in this context that I bring Mr. Bellante's cooperation to your attention for your consideration in reaching a final determination of the matter before you. In the final analysis, this determination must be made by your office and we do not in any way intend to interfere with your discretion in this matter."[4]

4. The full text of a typical letter follows:

"June 18, 1973
Commissioner John C. Kohl
Department of Transportation
1035 Parkway Avenue
Trenton, New Jersey 08625

Re: *United States v. Bellante, Clauss, Miller & Nolan, Inc., Cr. No. 345-73*

Dear Commissioner:

I am in receipt of a letter dated June 13, 1973 from the attorneys who represent Bellante, Clauss, Miller & Nolan, Inc. They have advised me that your office will be conducting a hearing on June 21, 1973 relative to the standing of this corporation to bid on public contracts in the State of New Jersey.

This is to advise that one of the principals of this firm, E. Lawrence Bellante, has been immunized by the United States District Court and has furnished valuable testimony to the United States Grand Jury that is currently investigating a scheme to defraud the United States in which contributors to the 1969 Cahill gubernatorial campaign were furnished false and fictitious invoices for non-existent services in order that these contributors could deduct their political contributions as ordinary and necessary business expenses. Mr. Bellante has cooperated fully with the United States Grand Jury and has testified as to his participation in this scheme. Indictments have been returned against Joseph M. McCrane, Nelson G.

Appendix E

In the trial court's view, the letters were no more than factual recitations of Bellante's status and the government had been under no obligation to disclose the correspondence.[5]

The record of the proceedings before trial shows that, in January of 1974, the defendant moved for discovery of *inter alia:*

> "[A]ll material known to the government . . . which is exculpatory in nature or favorable to the defendant, or may lead to the discovery of exculpatory material or material which may be used to impeach prosecution witnesses . . . ."

In reply, the government acknowledged its "continuing obligations" under *Brady v. Maryland,* 373 U.S. 83 (1963), to disclose any material that would exculpate the defendant or negate his guilt: "However, the Government does not know of any exculpatory material." At a hearing in April of 1974, the presiding judge, in ruling on discovery of *Brady* material, addressed the government attorney:

> "Let me put it this way to you, . . . [i]f there is anything of a questionable nature, you should put it aside and let me review it in camera, and I'll decide."

---

4. (Cont'd.)

Gross, as well as Bellante, Clauss, Miller & Nolan, Inc., all emanating from Mr. Bellante's testimony.

This office brings these facts to your attention for your consideration as to whether Bellante, Clauss, Miller & Nolan, Inc., should be barred from further bidding on state work. On previous occasions we have expressed our concern that individuals that cooperate with the United States Grand Jury pursuant to a grant of immunity should not be penalized for telling the truth. It is in this context that I bring Mr. Bellante's cooperation to your attention for your consideration in reaching a final determination of the matter before you. In the final analysis, this determination must be made by your office and we do not in any way intend to interfere with your discretion in this matter.

If there are any further questions that you may have, please do not hesitate to call me.

Very truly yours,"

5. The government does not contend that the defendant had any knowledge of these letters until the newspaper story was published. We assume, therefore, that he did not.

Appendix E

Under *Brady v. Maryland, supra,* the suppression of material evidence by the government requires that a new trial be ordered regardless of good or bad faith on the part of the prosecution. *Giglio v. United States,* 405 U.S. 150 (1972), makes it clear that, when the reliability of a given witness is critical to a determination of guilt or innocence, non-disclosure of evidence affecting credibility falls within *Brady*'s rule. *See also Napue v. Illinois,* 360 U.S. 264 (1959); ABA STANDARDS, DISCOVERY AND PROCEDURE BEFORE TRIAL § 2.1 (1970); ABA STANDARDS, THE PROSECUTION FUNCTION AND THE DEFENSE FUNCTION § 3.11 (1971).

A promise of preferential treatment given to a witness by the government is admissible for impeachment purposes. *United States v. Harris,* 498 F.2d 1164, 1169 (3d Cir. 1974); *United States v. Newman,* 490 F.2d 139, 146 (3d Cir. 1974).

However, not all impeachment matter must be disclosed; the obligation extends only to that which is material. Cases in this court have framed the test in terms of that which is reasonably likely to have changed the jury's judgment. *United States v. Harris, supra; United States ex rel. Dale v. Williams,* 459 F.2d 763 (3d Cir. 1972).[6] Consideration must be given to the witness' testimony, that is, whether it is merely corroborative, *United States ex rel.*

---

6. The Court of Appeals for the Second Circuit applies a test which depends on whether the "suppression" of *Brady* material is deliberate or inadvertent. Judge Gibbons, sitting by designation, recently summarized the Second Circuit's position in United States v. Hilton, 521 F.2d 164, 166 (2d Cir. 1975):

> "If the government deliberately suppresses evidence or ignores evidence of such high value that it could not have escaped its attention, a new trial is warranted if the evidence is merely material or favorable to the defense. But if the government's failure to disclose is inadvertent, a new trial is required only if there is a significant chance that this added item, developed by skilled counsel, could have induced a reasonable doubt in the minds of enough jurors to avoid a conviction."

See United States v. Rosner, 516 F.2d 269 (2d Cir.), *petition for cert. filed,* 44 U.S.L.W. 3207 (U.S. September 29, 1975) (No. 75-492); United States v. Sperling, 506 F.2d 1323, 1333 (2d Cir. 1974), *cert. denied,* 420 U.S. 962 (1975); United States v. Kahn, 472 F.2d 272, 287 (2d Cir.), *cert. denied,* 411 U.S. 982 (1973); United States v. Miller, 411 F.2d 825, 832 (2d Cir. 1969); United States v. Keough, 391 F.2d 138, 147-148 (2d Cir. 1968).

The result we reach in this case would be the same under either our cases or those listed above.

Dale v. Williams, supra at 765, or essential, *Giglio v. United States,* 405 U.S. at 154-155.

Accordingly, the absence of the impeachment matter is material if the information which the government withholds tends to impair seriously the reliability of the only witness whose testimony carries the case to the jury.[7] In such circumstances, the failure to disclose goes to a matter reasonably likely to affect the judgment of the jury. *Giglio v. United States, supra.*

The district court reasoned that the government's failure to disclose did not deny the defendant's right to a fair trial because the letters were not "favorable" within the meaning of *Brady.* The letters were characterized as factual recitations which contained no evidence of any understanding between Bellante and the United States Attorney's office or expectation of favors in exchange for cooperation. We agree that this is a reasonable interpretation of the letters, and one which the jurors *might* have accepted. However, we cannot exclude the other inference, just as reasonable, that at least some of the jurors might have felt that the mere act of writing the letters was preferential treatment by the U.S. Attorney.

Although the letters were couched in neutral tones, cross-examination might have revealed whether they were, in fact, helpful to Bellante in securing or retaining profitable contracts for his firm. Presumably, there had been some discussion between the United States Attorney's office and Bellante or his attorneys before the letters were sent. The substance of those conversations might be important in evaluating Bellante's reliability as a witness.

The impact of impeachment evidence is usually affected by the atmosphere created by the direct examination. It is helpful to review the trial record in order to put the undisclosed information in the proper perspective.

7. At the conclusion of the prosecution's case, the court granted acquittal for each count where there was no evidence of communication between the defendant and the contributor. Bellante supplied the only such evidence as to Counts X and XI.

The United States Attorney began his direct examination of Bellante by reminding him of his immunization and his continuing obligation to testify truthfully. At the outset, therefore, the jurors might have inferred that Bellante was a reluctant witness. This impression would have been fortified by the witness' statements on cross-examination that the tax deduction had been inadvertent on his part and that he had been friendly with the defendant. It is difficult to predict the reaction of the jury if, at that point, the letters written by the United States Attorney's office had been brought to their attention. The letters perhaps might have had no effect; but undeniably they could have shown that the witness, rather than being hostile to the prosecution, was in fact cooperative and financial self-interest was involved.

Of course, we do not pass upon the witness' credibility: that important task is reserved for the jury. The error here was the government's withholding of material which would have assisted the defendant in casting doubt on the credibility of a crucial witness against him.

Furthermore, were we to apply the test used in the Second Circuit, it would be pertinent to note that the government does not assert inadvertence. Indeed, it could not because the last of the letters written before trial was signed by the Assistant United States Attorney who actually tried the case. Accordingly, the trial was not one which owed its imperfection to negligence or inadvertence. To the contrary, this is a situation where the prosecution chose to ignore the sage admonition of the pretrial judge and took it upon itself to decide a serious legal question adversely to the defendant. To remedy the government's error, we must order a new trial on Counts X and XI.

The defendant has asserted a number of other grounds applicable to all counts:

1. The judgment of acquittal for conspiracy to violate 26 U.S.C. § 7206(2) precludes conviction for aiding and assisting others in violating 26 U.S.C. § 7206(2).

We find no merit to this contention. As the district court noted in its post-trial memorandum, the alleged conspiracy involved different people from those in the substantive counts. It is clear that failure to prove a conspiracy among A, B and C does not preclude a conviction on a count that A aided Y in committing a substantive offense. *See Nye & Nissen v. United States,* 336 U.S. 613, 619-620 (1949).

2. The indictment was improperly amended.

The substantive counts described the illegal activity and included the language: "Pursuant to the plan and purpose to commit the crime set forth in Count I [the conspiracy count] of this indictment . . . ." The trial judge correctly held that this phraseology was surplusage and did not include the challenged verbiage in his instruction to the jury. He committed no error in that respect. *See United States v. Musgrave,* 483 F.2d 327, 337 (5th Cir.), *cert. denied,* 414 U.S. 1023 (1973). The quoted language did not set forth an essential element of the crime, nor did its deletion affect the charges brought by the grand jury in any substantial manner. *United States v. Gross,* 511 F.2d at 916; *United States v. Radowitz,* 507 F.2d 109, 112 (3d Cir. 1974); *United States v. Somers,* 496 F.2d 723 (3d Cir.), *cert. denied,* 419 U.S. 832 (1974); *United States v. DeCavalcante,* 440 F.2d 1264, 1271 (3d Cir. 1971).

The defense contends that the indictment was "amended" by preparing for the jury's use an edited version not containing the phraseology quoted or the counts which had been dismissed. This contention has no basis. The document which was sent out with the jury was not *the* indictment; it was simply a memorandum to aid the jury's deliberation. The mere preparation of a redacted version or a "clean copy" of an indictment is not an amendment. *See Dawson v. United States,* 516 F.2d 796, 801 (9th Cir. 1975); *United States v. Cirami,* 510 F.2d 69 (2d Cir.), *cert. denied,* 421 U.S. 964 (1975); *United States v. Bryant,* 471 F.2d 1040 (D.C. Cir. 1972), *cert. denied,* 409 U.S. 1112 (1973).

3. The defendant could not be prosecuted under § 7206(2) since that section is applicable only to accountants, bookkeepers, tax consultants, or preparers who actually prepare the tax returns.

While the defendant cites a litany of cases where persons in those categories were convicted, that compilation does not establish the narrow reading of the statute which he urges.

The defendant was convicted on evidence that he assisted certain taxpayers by providing false invoices as documentation of business expenses. He also advised and counseled the contributors to use these expenditures as tax deductions. His activities fall within the statutory proscription of conduct by an individual who "wilfully aids or assists in, or procures, counsels or advises the preparation . . . of a return . . . which is fraudulent or false as to any material matter." *See United States v. Haimowitz,* 404 F.2d 38 (2d Cir. 1968); *Rubenstein v. United States,* 214 F.2d 667 (10th Cir. 1954).

4. Insufficiency of the evidence.

Count III charged that the Hialeah Race Course, Inc. income tax return showed $2,000.00 paid for services purchased from Writers Associates when that sum, in fact, was a non-deductible political contribution. The evidence established that the defendant, who was then vice president of the corporation which controlled Hialeah, gave express instructions for the payment.

The evidence under Count IV was that the defendant told an official of Trap Rock Industries that he would furnish fictitious invoices to facilitate the deduction of the political contribution as a business expense. The deduction was in fact taken in Trap Rock's return in 1969.

The district court reviewed the evidence at length and in detail. We agree with its conclusion that the evidence was sufficient to support conviction. Since Counts X and XI must be retried, we will not pass upon the evidence as to them.

5. Errors in the charge.

Before the court began its instructions to the jury, the defense asked the trial judge to admonish the jury about the counts which had been dismissed and the evidence pertaining to them. The court charged:

> "In deciding this case, members of the jury, you are to consider each count individually. The fact that the Government has proved its case beyond a reasonable doubt or has failed to prove its case beyond a reasonable doubt as to any single count does not in and of itself require a finding of either guilty or innocent as to any other count. It is your obligation and duty to consider each count individually and arrive at a separate finding of guilty or innocent as to each of the four counts in the indictment. And as to each count you are to determine guilt or innocence only on the evidence that applies to that particular count."

Defendant took no exception to that part of the charge nor did he request any amplification of the instruction. Accordingly, we find no reversible error.

Defendant also contends that the court erred in its charge on knowledge and willfulness on the part of the defendant. We have reviewed the charge and find it adequate.

Finally, the defendant asserts that, because the court had ruled that the size of the tax deductions was not material, his closing argument was unduly limited on that issue. We find no reversible error in this respect.

After the briefs were filed and a few days before argument was scheduled in this case, the defendant filed a

motion for leave to enlarge the record or, in the alternative, for a remand to the district court for an evidentiary hearing. In support of the motion, he stated that on October 15, 1975 a grand jury returned an indictment against the former president of Trap Rock, including a count reciting the filing of a false corporate tax return in 1969.

One of the defenses to Count IV was that the defendant McCrane had not induced Trap Rock to deduct political contributions because it was well familiar with the practice and had followed it on numerous other occasions. According to the defendant's motion, the latest indictment suggests that the government was aware of tax fraud on the part of Trap Rock independent of the activity involving this defendant. The defense asserts, therefore, that the government's knowledge of Trap Rock's alleged fraud was *Brady* material which was not disclosed before the trial.

We deny the motion. Since these allegations are relevant to the establishment of cause for a new trial, the motion should be filed in the district court. *See* 2 C. WRIGHT FEDERAL PRACTICE AND PROCEDURE § 557 (1969). Our denial is without prejudice to any action which the defendant may wish to take in the district court. We do not pass upon and, hence, express no opinion on the merits of the motion.

The conviction on Counts X and XI will be vacated and these matters remanded for a new trial. The convictions on Counts III and IV are affirmed.

A True Copy:

Teste:

Clerk of the United States Court of Appeals for the Third Circuit.

APPENDIX F — JUDGMENT OF THE UNITED STATES COURT OF APPEALS DATED DECEMBER 18, 1975

UNITED STATES COURT OF APPEALS

For the Third Circuit

No. 75-1643

UNITED STATES OF AMERICA

vs.

JOSEPH M. MC CRANE, JR.,

Appellant

(D.C. Criminal No. 74-180)

ON APPEAL FROM THE UNITED STATES DISTRICT COURT

FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

Present: GIBBONS, *Circuit Judge* and MARKEY*, *Chief Judge, Court of Customs and Patent Appeals,* and WEIS, *Circuit Judge*

JUDGMENT

This cause came on to be heard on the record from the United States District Court for the Middle District of Pennsylvania and was argued by counsel.

* Chief Judge, Court of Customs and Patent Appeals, sitting by designation.

Appendix F

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court, filed May 13, 1975, be, and the same is hereby affirmed with regard to convictions on Counts III and IV; and it is further ordered that the convictions on Counts X and XI are vacated and these matters are remanded for a new trial, in accordance with the opinion of this Court.

ATTEST:

s/ Thomas F. Quinn
CLERK

December 18, 1975

APPENDIX G — MEMORANDUM OF THE UNITED STATES DISTRICT COURT DATED MAY 13, 1975

UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

NO. 74-180 CRIMINAL

UNITED STATES OF AMERICA
v.
JOSEPH M. McCRANE, JR.

MEMORANDUM AND ORDER

Defendant was found guilty by a jury on December 11, 1974 on four counts of aiding or assisting in the preparation of federal income tax returns that were false or fraudulent as to a material matter, in violation of 26 U.S.C. §7206 (2).[1] He now moves for a judgment of acquittal notwithstanding the jury verdict, or, in the alternative, for a new trial. What follows immediately is a general summary of the facts surrounding defendant's indictment and trial. A more detailed description of the facts relevant to each ground offered in support of the motions will be provided in connection with the discussion of each ground.

1. "Any person who . . . [w]illfully aids or assists in, or procures, counsels, or advises the preparation or presentation under, or in connection with any matter arising under, the internal revenue laws, of a return, affidavit, claim or other document, which is fraudulent or is false as to any material matter, whether or not such falsity or fraud is with the knowledge or consent of the person authorized or required to present such return, affidavit, claim or document . . . shall be guilty of a felony and, upon conviction thereof, shall be fined not more than $5,000, or imprisoned not more than 3 years, or both, together with the costs of prosecution."

Appendix G

On May 24, 1973, an indictment was returned against the defendant in the District of New Jersey alleging that he had committed several criminal acts during the time he was Finance Chairman for the 1969 New Jersey gubernatorial campaign of William T. Cahill. More particularly, Count I of the indictment charged a conspiracy among the defendant, four unindicted co-conspirators and others to defraud the United States by aiding and assisting several taxpayers to prepare fraudulent income tax returns. Essentially, the *modus operandi* charged in Count I was that the defendant and his co-conspirators had conspired to violate 26 U.S.C. § 7206(2) by furnishing fictitious invoices to the taxpayers in question so that they could disguise their contributions to the Cahill campaign as business expenditures in order to be able to subsequently deduct the amounts so contributed as ordinary and necessary business expenses on their income tax returns. Counts II through XI of the indictment charged the defendant with ten substantive violations of 26 U.S.C. § 7206(2), each count alleging an instance of the defendant aiding or assisting a taxpayer to prepare a fraudulent income tax return in the manner just described. Following several pretrial motions, defendant's trial commenced on September 10, 1974 before the Honorable Lawrence A. Whipple in the District of New Jersey. On defendant's motion, that trial ended in a mistrial on September 19 because of the effect of prejudicial publicity on the jurors.[2] Thereafter, a second trial

2. The pertinent circumstances of the mistrial are as follows: On September 19, 1974, a juror reported that he had cut out a newspaper article, the headline of which related to a previous mistrial motion by defendant being denied by the Court. He stated that he had done this to prevent other jurors from reading the article. It was then discovered, during a *voir dire* of this juror, that another juror had previously brought into the jury room an article regarding a mistrial in a prior state trial against the defendant, and had shown this article to other jurors. Defense counsel then moved again for a mistrial and the Court granted the motion.

commenced in the District of New Jersey on October 21, 1974, but that also ended prematurely when the Court granted the defendant's motion for a change of venue on October 25, and venue was transferred to the Middle District of Pennsylvania. Pursuant to the change of venue, trial commenced in this Court on December 2, 1974. At the conclusion of the government's case, the defendant's motion for a directed judgment of acquittal was granted with respect to the conspiracy count and six of the ten substantive counts of the indictment. Thereafter, the jury convicted the defendant on the remaining four substantive counts.

JUDGMENT OF ACQUITTAL

The defendant offers four arguments in support of his motion for judgment of acquittal: (1) under the doctrine of collateral estoppel, the judgment of acquittal on the conspiracy count directed by the Court at the close of the government's case precluded conviction on the substantive aiding and assisting counts; (2) he was improperly prosecuted under 26 U.S.C. § 7206(2); (3) there was insufficient evidence introduced at trial to warrant a conviction; and (4) the indictment should have been dismissed because of improper influences on the grand jury. The arguments will be addressed *seriatim*.

1. Collateral Estoppel

As mentioned above, the indictment in this case consisted of eleven counts, the first charging a conspiracy to violate 26 U.S.C. § 7206(2), and the remaining ten averring substantive

violations of that statute. Count I described the alleged conspiracy in great detail, setting out with specificity the plan to facilitate the raising of campaign funds by furnishing contributors a means of disguising their contributors as business expenditures in order to be able to deduct them later on their income tax returns as ordinary and necessary business expenses. In addition to the defendant, Count I named four unindicted co-conspirators: Richard H. Smith Associates, Inc., a public relations firm trading as Writers Associates (Writers Associates); Richard H. Smith, the president of Writers Associates; Suzanne Phillips Miller, an employee of Writers Associates; and Nelson G. Gross, the Chairman of the New Jersey State Republican Party (Gross's name was deleted from the indictment prior to the New Jersey trial and was not contained in the indictment under which defendant was tried before this Court.) Counts II thru XI then charged ten substantive violations of 26 U.S.C. § 7206(2), and, in describing the substantive offense, each of the remaining counts stated that it was "pursuant to the plan and purpose to commit the crime set forth in Count I of this indictment[.]"[3] Pointing to the quoted language, the defendant

3. Count III is illustrative:

> "1. Paragraph 1 of Count I is hereby realleged and incorporated herein as though set forth in full.
>
> 2. The defendant, JOSEPH M. McCRANE, JR., between on or about the 1st day of January, 1969, and on or about the 10th day of June, 1970, in the District of New Jersey, pursuant to the plan and purpose to commit the crime set forth in Count I of this indictment, did wilfully, knowingly and unlawfully aid and assist Hialeah Race Course, Inc. to prepare and present to the District

(Cont'd)

now argues that it was an essential element of each of the substantive counts that the unlawful aiding and assisting was pursuant to an overall plan to violate Section 7206(2), and that the Court's ordering of a directed judgment of acquittal on the conspiracy count on the ground that there was no evidence of an agreement among the alleged co-conspirators to violate the statute precluded conviction on the substantive counts. The defendant's theory is that the holding that there was no evidence of a plan to violate the statute collaterally estopped the government from asserting an essential element of the substantive counts, viz., that the unlawful aiding and assisting was pursuant to the overall plan to violate the statute alleged in Count I. Sealfon v. United States, 332 U.S. 575 (1948) (Defendant had been acquitted at a previous trial of having conspired with one Greenberg to defraud the United States by presenting false invoices and making false representations to a ration board to the effect that certain sales of sugar products were made to exempt agencies. That acquittal was held to provide him with a valid *res judicata* defense to a subsequent charge of having aided and abetted Greenberg in the commission of the same substantive offenses that had been alleged in connection with the conspiracy).

Director of Internal Revenue for the Internal Revenue District of Jacksonville, Florida, a 1969 United States Corporation Income Tax Return for the corporate fiscal year ending March 31, 1970, which was false and fraudulent as to a material matter in that it included the payment of $2,000.00 to the firm of Writers Associates as a services purchased expense, whereas, as the defendant, JOSEPH M. McCRANE, JR., well knew, this deduction was not an ordinary and necessary business expense, but was in fact a political contribution which the defendant had procured for the 1969 gubernatorial campaign of William T. Cahill and which the defendant JOSEPH M. McCRANE, JR. knew and believed was not tax deductible.

In violation of Title 26 United States Code, Section 7206(2) and Title 18, United States Code, Section 2."

While the defendant is correct in his description of the ground of the directed judgment of acquittal on the conspiracy count in this case, viz., that the government presented no evidence of an unlawful agreement among the alleged co-conspirators, he is incorrect in his characterization of this indictment as requiring proof that each count of unlawful aiding and assisting was pursuant to an overall plan to violate the statute in order to sustain a conviction on the substantive counts. For that reason, his collateral estoppel argument must be rejected.[4]

At the outset, it is clear that it is proper for the government to charge a conspiracy to violate the law in one count of an indictment and separately charge a substantive violation which was an object of the conspiracy. See Pinkerton v. United States, 328 U.S. 640, 643 (1946). Furthermore, acquittal on a charge of conspiracy is generally not a bar to prosecution and conviction of the substantive crime, even when that was the single overt act mentioned in the conspiracy count. See United States v. Wexler, 79 F. 2d 526, 528 (2d Cir. 1935). Under certain circumstances, however, an acquittal on a conspiracy count may foreclose prosecution and conviction on the substantive counts, as, for

---

4. Defendant's argument with respect to the language of the indictment aside, it is clear that the *Sealfon* rule does not apply to this case. The alleged conspiracy involved the defendant, Smith, Miller and Gross, while the substantive charges involved the defendant and various corporations and corporate officers. The dismissal of the conspiracy count because there was no evidence of an unlawful agreement among the defendant and the alleged co-conspirators bore no relationship to the substantive counts, which accused the defendant, independently of Smith, Miller and Gross, of assisting others to submit fraudulent returns. In other words, the unlawful agreement alleged in Count I was not an essential element of the substantive offenses alleged in Counts II through XI.

example, when the acquittal necessarily establishes that a fact essential for a conviction of the substantive count does not exist. United States v. Sealfon, *supra*. The defendant seeks to bring this case within the *Sealfon* rule by arguing that the language "pursuant to the plan and purpose to commit the crime set forth in Count I of this indictment . . ." adds an element to the offense charged. That language, however, is not an essential part of the indictment in this case, but is instead a mere descriptive reference to the conspiracy count included in order to facilitate an understanding of the substantive counts charged by providing them with a frame of reference. It was not an essential element of the crime charged in the indictment and does not constitute an enlargement of the statutory language of 26 U.S.C. § 7206(2). As such it was mere surplusage with respect to the indictment in this case, and could have been stricken from that document without rendering the charge inadequate. See Brady v. United States, 24 F. 2d 397, 399 (8th Cir. 1928). Indeed, the language was deleted when the indictment was redrafted by counsel for both parties following the directed judgment of acquittal in order to remove any reference to the counts no longer before the jury, and the Court read the redrafted indictment, specifically Count III, in the charge to the jury. Since proof of a plan or an agreement was not an essential element of the substantive aiding and assisting counts, the directed judgment of acquittal on the conspiracy count did not preclude conviction on the substantive counts.

2. Prosecution Under 26 U.S.C. § 7206(2)

The defendant makes a two-pronged argument that his prosecution under 26 U.S.C. § 7206(2) was improper. He argues first, as a matter of statutory construction, that the statute was not intended to, and does not in fact, apply to the conduct with which he was charged. In the alternative he maintains that if the statute is construed as applying to that conduct, it is void for vagueness. Both contentions are without merit.

With respect to the statutory construction argument, it is defendant's position that the conduct with which he was charged (a charge, incidentally, which was supported by sufficient evidence introduced at trial, see *infra*) does not amount to a violation of Section 7206(2). Essentially that conduct was that the defendant provided fictitious invoices to certain corporations to enable them to disguise their political contributions as ordinary and necessary business expenses, and that he advised executives of those corporations to deduct for tax purposes their political contributions by expensing them with the fictitious invoices. In support of his contention that this conduct does not come within the statute, the defendant argues that the statute is limited to persons who directly affect the preparation of tax returns or other Internal Revenue Service (IRS) documents by falsifying or counseling and procuring the falsification of items in the actual tax return or other IRS documents. Thus, defendant maintains, the statute is only applicable to accountants, bookkeepers, tax consultants or persons who actually prepare tax returns, who are responsible for the books and records of the taxpayer who filed the return, or who cause

the tax return to be filed. His conduct is too attenuated and remote from the actual preparation of any tax returns or other IRS documents, he concludes, and thus does not come within the purview of the statute.

Although defendant cites numerous cases involving Section 7206(2) prosecutions of persons to whom he contends the statute is limited, i.e., accountants, bookkeepers, tax consultants or preparers, he offers no case which holds that the statute is confined to prosecutions of those classes of individuals.[5] By the same token, there does not seem to be any reported case which has held conduct identical to defendant's to be within the scope of the statute in the face of a contention to the contrary.[6]

5. Indeed, his suggestion that Section 7206(2) prosecutions can only be directed against those who actually engage in the preparation of a false tax return is belied by the case on which he most heavily relies, Rubenstein v. United States, 214 F. 2d 667 (10th Cir. 1954). In *Rubenstein* the court examined the sufficiency of the evidence to determine whether the defendant husband had caused to be made a false report of income upon which an accountant relied in preparing the defendant's wife's income tax return. Because the report was in fact not false and the defendant had no other contact with the accountant, the court ruled that a judgment of acquittal be entered. Rubenstein v. United States, *supra*, at 670. The case implies, however, that if the report prepared by the husband had been false, there would have been sufficient evidence to uphold his conviction, even though he had not participated in the actual preparation of the return.

6. Although United States v. Gross, — F. 2d — (3d Cir. 1975) (opinion filed February 19, 1975) involved a defendant who was convicted of violating Section 7206(2) by conduct substantially the same as defendant's in this case, the issue of whether such conduct is within the scope of the statute does not appear to have been raised in that case. Nevertheless, not all of the reported cases dealing with Section 7206(2) deal with conduct as limited as that to which defendant would confine the statute's application. *See, e.g.*, United States v. Haimowitz, 404 F. 2d 38 (2d Cir. 1968) (Defendants, as parimutuel twin double winners at two New York race tracks, were required to report

(Cont'd)

Nevertheless, the mere fact that no court has previously considered the question does not mean that the defendant's conduct is not within the purview of the statute. The key questions are whether the defendant's conduct falls within the language and the legislative purpose of Section 7206(2), and the answer to both is that it does.

The statute provides in pertinent part that whoever "[w]illfully aids or assists in, or procures counsels, or advises the preparation. . .of a return. . .which is fraudulent or is false as to any material matter" shall be guilty of an offense against the United States. Defendant assisted certain corporate executives and their corporations by furnishing them with false invoices which provided documentary support for claiming business deductions on their corporate tax returns which were not truthful. Furthermore, he counseled and advised those corporations to falsify their tax returns by claiming what were actually political contributions as ordinary and necessary business expenses. In both respects his conduct clearly falls within the wording of the statute.

In addition, defendant's conduct falls within the statutory purpose of Section 7206(2) because it constitutes an evil which

(Cont'd)

their names and the amount of their winnings to the race track in order that the track could file an Internal Revenue Service information return, Form 1099, which is required by 26 U.S.C. § 6041(a). Instead, they paid others to pick up their winnings and report their names to the track, thereby preventing their own names and winnings from being included on the returns that were filed by the tracks. They were convicted of violating Section 7206(2) for having aided and assisted the race tracks to file returns that were false or fraudulent as to material matters.).

the statute was enacted to prevent. 26 U.S.C. § 7206 is in essence a perjury statute designed to punish the intentional falsification of tax returns and other IRS documents. Section 7206(1) is directed at persons who falsify their own returns, while 7206(2) deals with those who aid others in falsifying their returns. Section 7206(1) has been held to apply to any intentional falsification of a return, regardless of the tax consequences of the falsehood. United States v. Divarco, 343 F. Supp. 101 (N.D. Ill. 1972), aff'd, 484 F. 2d 670 (7th Cir. 1973), cert. denied, 415 U.S. 919 (1973) (falsifying one's source of income, as distinguished from the amount of income, held to be a violation of Section 7206(1)). In the context of that decision, the court in *Divarco* stated that a basic rationale of the statute is to insure "truthful representation as to all matters, [without which] it becomes administratively more difficult, if not impossible, for the Internal Revenue Service (IRS) to compute the amount of tax due or to check on the accuracy of returns. . ." *Id.*, at 103. That rationale applies equally to Section 7206(2). The defendant, by assisting the preparation of false tax returns in the manner charged and proven in this case, made it difficult for the government to discover that deductions taken for business expenses were in reality political contributions, thereby obstructing the government in determining the accuracy of the tax returns filed by the corporations involved in this case. That conduct is clearly embraced by the legislative purpose of Section 7206(2). I conclude, therefore, that the defendant's conduct constituted a violation of the statute.

The contention that Section 7206(2) is unconstitutionally vague if construed to apply to his conduct is totally without

merit. While the reach of the statute is broader than the strict confines the defendant would impose on it by limiting its application to conduct directly involved with the actual preparation of tax returns, *see supra,* such breadth does not even approach the degree of imprecision that must be found in a statute in order for it to be held unconstitutionally vague. *See* Grayned v. City of Rockford, 408 U.S. 104 (1972). *Cf.* Papachristou v. City of Jacksonville, 405 U.S. 156 (1972). The only basis on which the defendant argues that the statute is impermissibly vague is the application of the phrase "aids or assists" to conduct other than that directly related to the actual preparation of tax returns. He maintains that if the statute is not limited to assisting in the actual preparation, it will not furnish fair warning of what conduct is prohibited and, consequently, will be capable of trapping every innocent "individual who supplied an invoice, bill or receipt to another person or corporation that later used these items to document a false or fraudulent expense in their tax returns." Defendant's Brief, p. 38. The defendant overlooks the requirement of a finding of willfulness which the statute expressly imposes. To satisfy this requirement, the jury had to find beyond a reasonable doubt that the defendant's conduct was done "voluntarily and intentionally and with a specific intent to do something the law forbids." Notes of Testimony (N.T.), Vol. VIII, p. 33. In the context of Section 7206(2) and this case, the jury had to find that the defendant acted with the specific intent to help three corporations file false and fraudulent income tax returns. Particularly in view of the requirement of willfulness, therefore, the statute provides ample warning of what conduct is prohibited and is not impermissibly vague.

Appendix G

3. Sufficiency of the Evidence

The defendant's first two arguments with respect to the sufficiency of the evidence have already been disposed of. They are (a) that there was no evidence that the defendant's conduct was pursuant to an overall plan to violate the statute, and (b) that there was no evidence that he participated in the actual preparation of the tax returns of the corporations involved in this case. As has already been noted, it is not an element of a Section 7206(2) violation that the unlawful conduct be pursuant to a plan to violate the statute, and the application of the statute is not confined to the actual preparation of tax documents. Accordingly, defendant's contention that the evidence must show such a plan and the defendant's participation in the preparation of the tax returns must be rejected.

What the evidence must show in order to support the defendant's conviction in this case is that he (a) willfully (b) aided or assisted in, or procured counseled, or advised (c) the preparation or presentation of tax returns (d) that were false or fraudulent as to a material matter. Bearing in mind that in evaluating the sufficiency of the evidence to support a conviction the court must take a view of the evidence most favorable to the government, United States v. Pratt, 429 F. 2d 690 (3d Cir. 1970), together with all inferences which may reasonably be drawn from the facts, United States v. Martinez, 486 F. 2d 15, 23 (5th Cir. 1973), a review of the evidence presented at the trial in this case demonstrates that it amply supports the defendant's conviction.

Appendix G

With respect to Count III of the indictment, which charged the defendant with having aided and assisted Hialeah Race Course, Inc. (Hialeah) in filing a false 1969 corporate income tax return, the evidence revealed the following. On two occasions in 1969, once during the primary and again during the general New Jersey gubernatorial campaign, the defendant caused Writers Associates to send an invoice in the amount of $1,000.00 to Hialeah, even though he knew that Writers Associates did not perform the services indicated in the invoice. Writers Associates subsequently received two $1,000.00 checks from Hialeah, and, pursuant to the defendant's instructions, the proceeds from those checks were used for campaign expenses. The evidence showed further that the invoices in question were paid pursuant to the express instructions of the defendant, who was the Vice President and General Manager of Garden State Racing Association which, in turn, owned a controlling interest in Hialeah. Finally, the evidence disclosed that the two $1,000.00 checks were recorded on Hialeah's books as a services purchased expense and deducted on its 1969 corporate income tax return as an ordinary and necessary business expense.

The evidence with respect to the remaining counts on which the defendant was convicted was at least as strong as the evidence with respect to Count III. Count IV charged the defendant with having aided and assisted Trap Rock Industries, Inc. (Trap Rock) to file a false 1969 corporate income tax return. The evidence showed that the defendant, in an effort to solicit a substantial political contribution from Trap Rock, advised its officers that he could provide them with false business invoices which would enable the corporation to disguise its political

contribution as a business expense in order to be able to deduct it on its tax return, thereby paying the contributions "with 50 cent dollars rather than whole dollars" N.T., Vol. V, p. 10; that he knew Writers Associates did not perform the services represented by those invoices; that Trap Rock paid the invoices with two checks the proceeds of which were used for campaign expenses; and that Trap Rock carried the checks on its books as an advertising expense and deducted them on its 1969 tax return as an ordinary and necessary business expense. Counts X and XI alleged that the defendant aided and assisted Bellante, Clauss, Miller and Nolan, Inc. (Bellante, Clauss) to file false corporate income tax returns for the years 1968 and 1969. (Count X pertained to the 1968 return and Count XI to the 1969 return). The evidence showed that the defendant solicited substantial political contributions from Bellante, Clauss by advising E. Lawrence Bellante, the President of that firm, that he could provide him with false invoices that could be used by the firm as the basis for deducting political contributions as ordinary business expenses; that he caused Writers Associates and another advertising firm, Bofinger-Kaplan, Inc., to send invoices to Bellante, Clauss in a total amount of $6,000.00, even though he knew neither advertising firm performed the services for Bellante, Clauss represented by the invoices; that Bellante, Clauss paid the invoices and that the proceeds of its payments were used for campaign expenses; and that Bellante, Clauss treated the $6,000.00 on its books as an advertising expense and deducted portions of that amount on its 1968 and 1969 income tax returns.

In sum, the evidence presented at trial was more than sufficient to support the conviction on each of the four counts. The defendant's theory, as evidenced by his cross examination of the government witnesses and the argument of counsel,[7] was that he supplied the corporations with false invoices in order to preserve their anonymity as contributors, and that he advised the corporate executives to deduct their political contributions as ordinary and necessary business expenses on their income tax returns because he was under the impression that such contributions could be so deducted. The jury obviously rejected his theory.

Nevertheless, in spite of the abundance of evidence introduced against him at trial, the defendant argues that the evidence was insufficient in two respects. He argues first that there was no evidence that he knew that a fraudulent return was ever filed by each of the corporations in question. This contention is similar to the argument that there had to be evidence of direct participation in the actual preparation of the returns, and must be rejected for the same reason, i.e., it misconceives the essence of a Section 7206(2) violation, which is the providing of assistance or advice with a view to the eventual preparation or presentation of a false or fraudulent IRS document. While the offense may not be completed until the document is actually prepared or presented, see United States v. Habig, 390 U.S. 222, 223 (1968), direct participation by the defendant in that preparation or presentation, or knowledge on

7. The defendant did not testify in his own behalf, nor did he present any witnesses to testify in his behalf.

the part of the defendant of when the document was in fact prepared or presented is not an essential element of a Section 7206(2) offense, and evidence of such participation or knowledge is not necessary to support a conviction under the statute.

Defendant next argues that there was no evidence that he knew that the deductions taken by the corporations were not ordinary and necessary business expenses; that is, assuming that he knew that the firms were planning to deduct their contributions to the Cahill campaign as ordinary and necessary business expenses, there was no evidence that he knew that political contributions are not tax deductible. In essence, he argues that there was insufficient evidence of willfulness to support his conviction.

In order for the jury to find that the defendant acted willfully within the meaning of the statute, they had to find that he acted "voluntarily and intentionally and with the specific intent to do something the law forbids. That is to say, with bad purpose either to disobey or disregard the law." N.T., Vol. VIII, p. 33. *See* United States v. Malinowski, 472 F. 2d 850, 853 (3d Cir. 1973). Mindful that direct proof of the unlawful intent is not necessary and that willfulness may be established from all the facts and circumstances surrounding the case, United States v. Barnes, 313 F.2d 325 (6th Cir. 1963), there was ample evidence in this case from which the jury could properly conclude that the defendant acted willfully within the meaning of the statute. The evidence showed that the defendant advised corporate executives that he would furnish them a device whereby they could disguise their political contributions as

business expenses in order to be able to later deduct them on their income tax returns; and that he caused two public relations firms to provide the corporations with fictitious invoices in the amount of their political contributions, which were later used to expense those contributions as business expenses. The jury could properly infer that the defendant used this scheme because he knew that political contributions were not deductible and that the corporations would not be able to deduct their contributions to the Cahill campaign unless they had a means of disguising those contributions as legitimate business expenses. Furthermore, testimony regarding defendant's conversations with several of the witnesses furnished an additional basis upon which the jury could properly infer guilty knowledge and willfulness. On the one hand, according to the testimony of Smith and Miller, the defendant informed them that the fictitious invoices should be sent in order to preserve the anonymity of the contributors, with no mention that the invoices were for tax purposes. Indeed, Smith testified that when he expressed concern to the defendant because of the fund-raising methods, the defendant informed him that the sending of the fictitious invoices "has nothing to do with taxes. It had to do with the people who want to preserve their anonymity." N.T., Vol. II, pp. 92-93. On the other hand, Bellante and Mendelson, the general manager of Trap Rock, testified that the defendant informed them that the invoices would be furnished them for tax purposes, with no mention of anonymity. On the basis of the testimony of Bellante and Mendelson, the jury could have properly concluded that the actual purpose of the fictitious invoice scheme was to provide the taxpayers with documentation for falsifying their tax returns. And, on the basis

of Smith's testimony, the jury could properly have inferred that the defendant knew that the invoice scheme was unlawful, in that, if he had thought otherwise, he would not have assured Smith that the scheme was for anonymity and not for tax purposes.

4. Improper Influences on the Grand Jury

Defendant argues that the indictment in this case should be dismissed because it was tainted by two kinds of improper influence on the grand jury's deliberations: (a) prejudicial publicity concerning the defendant that appeared in several newspapers immediately prior to and during the grand jury's deliberations, and (b) the calling of the defendant to testify before the grand jury even though he was a prospective defendant at the time and the government knew that he intended to invoke his privilege against self-incrimination, as well as the manner in which the defendant was repeatedly required to assert his fifth amendment privilege during his testimony before the grand jury. Both contentions are without merit.

With respect to the first contention, the defendant points to no actual bias or undue influence on the grand jury, but argues instead that the mere existence of the extensive pre-indictment publicity in this case mandates a *per se* conclusion that the grand jury was biased and that the indictment must be dismissed. The identical argument was made before Judge Whipple in the District of New Jersey in support of a motion to dismiss the indictment filed prior to the first trial in this case. It was rejected

on that occasion and must be rejected on this occasion as well. In the words of Judge Whipple:

> "In the instant case, without a shred of evidence to the contrary, 'it must be presumed that the Grand Jury followed the court's instructions as to its powers, duties and obligations and that each grand juror fully lived up to and observed his solemn oath. Indeed there is a strong presumption of regularity accorded to the deliberations and findings of Grand Juries.' *United States v. Kahaner,* 204 F. Supp. 921 (S.D.N.Y. 1962), *affirmed,* 317 F. 2d 459 (2d Cir. 1963). Therefore, since the instant defendant has not presented any evidence, nor have I found any, that the Grand Jury was prejudiced against Mr. McCrane, this Court declines to rule in the defendant's favor on the basis of this allegation."

United States v. Joseph M. McCrane, Jr., Crim. No. 341-73, D.N.J. 1973, opinion filed April 23, 1974, p.3. *See* also United States v. Addonizio, 313 F. Supp. 486, 495 (D.N.J. 1970), *aff'd,* 451 F. 2d 49 (3d Cir. 1971), *cert. denied,* 405 U.S. 936 (1972) ("Nothing of substance is provided to support defendants' allegations. Mere conjecture that some impropriety may have occurred and some infirmity in the proceedings resulted thereby is an insufficient premise for the relief sought.")

The second contention is equally meritless. It is clear that it is not improper to call a prospective defendant to testify before

the grand jury which ultimately indicts him, even when such a defendant makes it known to the prosecuting authority that he intends to invoke the Fifth Amendment. United States v. Addonizio, *supra*, at 495; United States v. Wolfson, 405 F. 2d 779, 784-785 (2d Cir. 1968), *cert. denied,* 394 U.S. 946 (1969). Such a practice is consistent with the government's responsibility to fully investigate suspected criminal activity and to thoroughly test a witness's invocation of the Fifth Amendment to insure that the privilege is being properly claimed. United States v. Sweig, 441 F. 2d 114, 121 (2d Cir. 1971), *cert. denied,* 403 U.S. 932 (1971); United States v. Wolfson, *supra* at 785. Furthermore, a reading of the transcript of the grand jury proceeding reveals no impropriety in the manner in which the defendant was questioned. The government's attorney did nothing more than properly test the validity of the defendant's reliance on his right to remain silent. *See* United States v. Wolfson, *supra,* at 785.[8]

NEW TRIAL

The numerous grounds asserted by the defendant in support of his motion for a new trial may be grouped in four general categories: (1) the failure of the government to produce exculpatory evidence; (2) the lack of authorization of the Assistant United States Attorney who prosecuted the case to

8. Indeed, it would appear that the defendant's invocation of the Fifth Amendment before the grand jury was not entirely valid, inasmuch as, following a hearing before Judge Lacey out of the presence of the grand jury, the judge ordered the defendant to answer three of the questions which he had previously refused to answer on Fifth Amendment grounds.

represent the government in this district; (3) the manner in which the government utilized the fact that several government witnesses had been granted immunity; and (4) this court's instructions to the jury. They will be discussed in the order listed.

1. Exculpatory Evidence

The defendant maintains that two failures of the government to produce exculpatory evidence during his trial mandate the granting of a new trial: (a) the failure to produce seven letters written by the office of the United States Attorney on behalf of E. Lawrence Bellante, a key government witness in this case, and (b) the failure to timely produce other allegedly exculpatory evidence (such evidence was produced during the trial, but only after the defendant specifically requested that it be produced). In neither instance does the government's conduct require the granting of a new trial.

a. The Bellante Letters

These letters were the subject of an earlier opinion by this Court, on March 6, 1975, in which it was ordered that all communications written by the government at the behest or on behalf of any witnesses who testified at defendant's trial be turned over to the defendant in order that the question of whether their non-disclosure necessitates a new trial may be fully

and freely discussed.[9] That order resulted in the production of eight letters written on behalf of Bellante, seven prior to the trial and one after the trial, and the defendant now argues that the non-disclosure of the initial seven letters mandates a new trial under the standards of Brady v. Maryland, 373 U.S. 83 (1963), and Giglio v. United States, 405 U.S. 150 (1972).

The letters in question were written between 18 and 11 months prior to the commencement of defendant's trial before this Court (six during the summer and fall of 1973 and one in January of 1974), and were sent in response to requests made of the United States Attorney's office either by Bellante's counsel or by the addressee (four were solicited by Bellante's attorney and three by the party to whom the letter was sent). They are all substantially identical, and are in essence letters written to various public authorities and offices in the state of New Jersey[10] explaining the relationship between the United States Attorney's office and Bellante and his architectural and

9. Defendant first learned of the existence of the letters on December 15, 1974, which was four days after the completion of his trial, when two New Jersey newspapers reported that Bellante had received an architectural contract for a new sports stadium to be built in New Jersey, and that the United States Attorney for the District of New Jersey had written letters on behalf of Bellante in order to help him secure the contract.

10. The dates and addresses of the letters are as follows: June 18, 1973 to Commissioner John C. Kohl of the New Jersey Department of Transportation; June 21, 1973 to John L. Swink, Senior Vice President and Treasurer of Rutgers University; July 5, 1973 to the New Jersey Sports and Exposition Authority; July 5, 1973 to Milton H. Gelzer, Esquire; July 13, 1973 to Donald S. Howard, President of the Board of Education of the Borough of Rumson; October 16, 1973 to William W. Watkin, Jr., Executive Director, Delaware River Port Authority; and January 8, 1974 to Richard C. Walters, Assistant Counsel, Department of the Navy.

engineering firm, Bellante, Clauss, Miller and Nolan, Inc., which at the time was under consideration for architectural contracts in connection with various public projects in the state of New Jersey.[11] In each instance the letter advised that Bellante has received immunity and has cooperated fully with the grand jury investigating the tax fraud scheme underlying this case by furnishing valuable testimony to that body; that as a result of this testimony indictments have been returned against Joseph McCrane and the firm of Bellante, Clauss; that Bellante should not be penalized because of these facts; and that the United States Attorney's Office takes no position with respect to what action the addressee should take as a result of being informed of these facts.

The defendant now argues that the non-disclosure of these letters mandates a new trial because, if he had possessed them during the trial, he could have used them to impeach the credibility of Bellante by showing that the letters were beneficial to the witness and that the witness was under the impression that the continued help of the government was dependent upon his testimony at defendant's trial. Such non-disclosure of impeachment evidence, defendant contends, requires a new trial under the standard elaborated in Brady v. Maryland, 373 U.S. 83 (1963), and Giglio v. United States, 405 U.S. 150 (1972). His argument misperceives the requirements of the *Brady-Giglio* rule, and mischaracterizes the significance of the letters at issue here.

11. The letter of June 18, 1973 is illustrative:

"June 18, 1973

Commissioner John C. Kohl
Department of Transportation
1035 Parkway Avenue
Trenton, New Jersey 08625

(Cont'd)

In effect, defendant argues that *Brady* and *Giglio* require a new trial whenever a search of the government's files at the conclusion of a trial turns up evidence that may have been used by the defense to impeach the credibility of one of the government's witnesses. Those cases impose no such rigid rule. *Brady* held "that the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." Brady v. Maryland, *supra,* at 87. *Brady* involved a petitioner whose defense had been to admit guilt of first degree murder while asking the jury to return a guilty verdict without capital

(Cont'd)

Re: United States v. Bellante, Clauss, Miller & Nolan, Inc., Cr. No. 345-73

Dear Commissioner:

I am in receipt of a letter dated June 13, 1973 from the attorneys who represent Bellante, Clauss, Miller & Nolan, Inc. They have advised me that your office will be conducting a hearing on June 21, 1973 relative to the standing of this corporation to bid on public contracts in the State of New Jersey.

This is to advise that one of the principals of this firm, E. Lawrence Bellante, has been immunized by the United States District Court and has furnished valuable testimony to the United States Grand Jury that is currently investigating a scheme to defraud the United States in which contributors to the 1969 Cahill gubernatorial campaign were furnished false and fictitious invoices for non-existent services in order that these contributors could deduct their political contributions as ordinary and necessary business expenses. Mr. Bellante has cooperated fully with the United States Grand Jury and has testified as to his participation in this scheme. Indictments have been returned against Joseph M. McCrane, Nelson G. Gross, as well as Bellante, Clauss, Miller & Nolan, Inc., all emanating from Mr. Bellante's testimony.

(Cont'd)

punishment because his co-defendant had done the actual killing. He was convicted and sentenced to death. After the trial, the defendant learned that the government had withheld a statement from his co-defendant admitting that he had committed the actual killing, even though prior to trial the defendant had requested production of all of his companion's extra-judicial statements. The Court held that such a suppression violated the principle of Mooney v. Holohan, 294

(Cont'd)

This office brings these facts to your attention for your consideration as to whether Bellante, Clauss, Miller & Nolan, Inc., should be barred from further bidding on state work. On previous occasions we have expressed our concern that individuals tha cooperate with the United States Grand Jury pursuant to a grant o immunity should not be penalized for telling the truth. It is in this context that I bring Mr. Bellante's cooperation to your attention for your consideration in reaching a final determination of the matter before you. In the final analysis, this determination must be made by your office and we do not in any way intend to interfere with your discretion in this matter.

If there are any further questions that you may have, please do not hesitate to call me.

Very truly yours,

HERBERT J. STERN
UNITED STATES ATTORNEY

By: JONATHAN GOLDSTEIN
First Assistant
United States Attorney

cc: Leo McCormack, Esq.
c/o Nogi, O'Malley & Harris
Miller Building
Scranton, Penna. 18503"

U.S. 103 (1935) (knowing use of perjured testimony to obtain a conviction held to violate due process), in that it denied the defendant a fair trial on the issue of his punishment. Brady v. Maryland, *supra*, at 87-88. The Brady rule was elaborated more fully by the Court in Moore v. Illinois, 408 U.S. 786 (1972), at 794-795:

> "The heart of the holding in *Brady* is the prosecution's suppression of evidence, in the face of a defense production request, where the evidence is favorable to the accused and is material either to guilt or to punishment. Important, then, are (a) suppression by the prosecution after a request by the defense, (b) the evidence's favorable character for the defense, and (c) the materiality of the evidence."

In Giglio v. United States, 405 U.S. 150 (1972), the Court made clear that the *Brady* rule extends to suppressed evidence relating to the credibility of a government witness. In *Giglio*, the prosecution did not disclose that the key witness at defendant's trial (the only one linking him to the crime) had been promised immunity from prosecution in return for his cooperation with the government, even though the witness denied the existence of any agreements or arrangements for prosecutorial leniency in the face of vigorous cross examination by defense counsel at trial. The Court held that due process had been violated and ordered a new trial. The opinion emphasized, however, that not every item of undisclosed evidence arguably affecting the credibility of

a government witness will require a new trial. The Court stated at 405 U.S. 154:

> "We do not, however, automatically require a new trial whenever 'a combing of the prosecutors' files after the trial has disclosed evidence possibly useful to the defense but not likely to have changed the verdict. . .*United States v. Keogh*, 391 F. 2d 138, 148 (CA2 1968). A finding of materiality of the evidence is required under *Brady, supra*, at 87. A new trial is required if 'the false testimony could. . .in any reasonable likelihood have affected the judgment of the *jury. . . Napue, supra*, at 271 [referring to Napue v. Illinois, 360 U.S. 264 (1959)].'"

The test, then, is whether the non-disclosed evidence could in any reasonable likelihood have affected the judgment of the jury.[12]

---

12. The Court's language has caused some confusion among the Courts of Appeals concerning which jury judgment is crucial here, the judgment of conviction itself, or the jury's assessment of the witness's credibility. The Third Circuit seems to have assumed that the test is whether the suppressed evidence could in reasonable likelihood have changed the jury's verdict. United States ex rel. Dale v. Williams, 459 F. 2d 763, 767 (3d Cir. 1972). See also United States v. Miller, 499 F. 2d 736, 744 (10th Cir. 1974) ("The salient inquiry is whether production of the requested information might have led the jury to entertain a reasonable doubt about the defendant's guilt.") The Ninth Circuit, on the other hand, states that the test is whether knowledge of the undisclosed evidence with respect to the credibility of a witness "might reasonably have affected the jury's assessment of his credibility." United States v. Butler,— F. 2d— (9th Cir. 1974), 16 Crim. L. Rept. 2345, 2346 (opinion filed 12-18-74). It is not necessary to decide here which view is correct, however, in that I hold the Bellante letters do not require a new trial under either standard.

When judged according to the standards of the *Brady* and *Giglio* cases, it is clear that the government's non-disclosure of the letters at issue here did not interfere with the defendant's due process right to a fair trial. Assuming that that non-disclosure amounted to "suppression by the prosecution after a request by the defense," Moore v. Illinois, 408 U.S. 786, 794 (1972),[13] the letters are not "favorable" to the defendant within the meaning of *Brady*. They are simply factual recitations of the status of Bellante and the firm of Bellante, Clauss in the United States District Court for the District of New Jersey. They contain no evidence of any understanding between Bellante and the United States Attorney's office or any belief on the part of Bellante that he would receive any favors or privileges in return for his cooperation with the government. Cf. United States v. Sperling, 506 F.2d 1323, 1332-1334 (2d Cir. 1974) (non-disclosure of letter from an informant-witness to an Assistant United States Attorney thanking the attorney for privileges he had arranged, asking for further favors, and discussing the status of his own pending case held to require new trial).[14] Nor do they contain

13. On several occasions prior to the commencement of his trial, the defendant made formal requests of the government for all exculpatory evidence.

14. Although *Sperling* involved a failure of the government to produce Jencks Act material, and thus the Court was not addressing the question of whether a new trial was required under the mandate of *Brady* and *Giglio*, it is nevertheless relevant here because of the similarity of the test applied in that case to the corresponding test in a *Brady-Giglio* inquiry. The Court in *Sperling* stated, 506 F. 2d at 1333: "Since the government failed to provide significant Jencks Act materials, the test is whether 'there was a significant chance that this added item, developed by skilled counsel . . . , could have induced a reasonable doubt in the minds of enough jurors to avoid a conviction.'" (citations omitted). The *Brady-Giglio* test is whether the non-disclosed evidence "'could . . . in any reasonable likelihood have affected the judgment of the jury . . .'" Giglio v. United States, 405 U.S. 150, 154 (1972) (citation omitted).

any other information that would have provided the defendant with a reasonable likelihood of affecting the jury's assessment of Bellante's credibility. Cf. United States v. Badalaments, 507 F.2d 12, 16-18 (2d Cir. 1974) (non-disclosure of letter from key witness to judge indicating that the witness was being harassed and terrorized to become a government informant and "trap a number of prominent people" held to require a new trial).[15] In light of the nature of the letters themselves, as well as the government's repeated assertions that there was no understanding or agreement between it and Bellante with respect to his testimony, other than Bellante's grant of immunity which was fully disclosed to the jury during the trial, the defendant's assertion that Bellante's testimony was given in reliance on preferential treatment by the government is simply non-tenable. Cf. United States v. Newman, 476 F.2d 733, 738 (3d Cir. 1973). Accordingly, I hold that this evidence could not have affected the judgment of the jury.

b. Untimely Production of Evidence

The defendant contends that the following four instances of governmental delay in producing evidence, allegedly required under *Brady* and *Giglio* to be disclosed to the defendant, mandate a new trial: (1) documents relating to payments by Trap Rock of invoices, allegedly representing political advertising, from advertising firms other than Writers Associates occurring both prior and subsequent to Trap Rock's transactions with Writers Associates referred to in Count IV; (2)

15. *Badalaments* is also a Jencks Act case. See footnote 14, *supra*.

a letter from Paul J. Sherwin to Arthur S. Kaplan of the advertising firm of Bofinger-Kaplan, Inc. on Cahill for Governor stationary relating to a bill to E. Lawrence Bellante; (3) a list of contributors to the Cahill campaign from whom Writers Associates received money; and (4) deposit slips of Writers Associates relating to these campaign contributions. It is defendant's position that these documents are all *Brady-Giglio* material because they impeach the credibility of government witnesses, and that the government's untimely presentation of the documents to the defense denied the defendant the opportunity to use them in the most effective manner possible, thereby preventing him from actually impeaching the credibility of the witnesses in question.

While it is apparently true that under some circumstances the untimely production of *Brady* material can result in a denial of due process,[16] it is clear for two reasons that this is not such a case: the documents in question are not *Brady-Giglio* material and the defendant was not prejudiced by the timing of his receipt of them.

16. *See, e.g.* Clay v. Black, 479 F. 2d 319 (6th Cir. 1973), where the defendant had been convicted of murder primarily on the basis of an eyewitness's testimony that the defendant had taken the decedent out of a car, placed him against the vehicle and shot him. The defendant's version was that he and the decedent had been struggling inside the car when the gun went off. During the trial defense counsel learned of an FBI report, received by the government approximately five months prior to the trial, that indicated that blood stains removed from the upholstery of the front seat of the car were of the same type and group as the decedent's. When he sought to introduce the report the trial court refused to admit it because there was no showing of chain of custody of the car for the intervening fourteen hours between the shooting and the taking of the blood sample. The Court of Appeals held that the failure of the government to produce the report prior to trial was a denial of due process, inasmuch as if defense counsel had had the report at that time he would have had time to make it admissible by establishing the chain of possession of the car. *Id.*, at 320.

With respect to the Trap Rock documents, it is necessary to relate some background facts in order to understand the defendant's argument. The defense strategy with respect to the count involving Trap Rock was to dispute that the defendant had arranged a scheme for Trap Rock to deduct its contributions made through Writers Associates by showing that Trap Rock had on several occasions prior and subsequent to the Writers Associates dealings made political contributions through other advertising firms which were later deducted on its tax returns. Simply stated, the defense argument was that Trap Rock did not need the defendant to demonstrate how to expense political contributions because it was experienced in that practice and, therefore, the testimony of Trap Rock's general manager in 1969, David Mendelson, that the defendant had solicited a contribution from Trap Rock by advising him that the firm could expense its contribution by ...ng a fictitious Writers Associates invoice which the defendant would furnish, was false. The credibility of Mendelson, then, was crucial to the government's case.

During cross examination, Mendelson stated that he was not aware of political contributions made by Trap Rock through advertising firms other than those that were made through Writers Associates about which he had testified on direct examination. Defense counsel then showed the witness three invoices to Trap Rock from other advertising firms, all marked paid, two of them initialed by the witness, and one of those two bearing the notation above the witness's initials "Nelson Gross Campaign." (Defense exhibits 19-21) In spite of defense counsel's vigorous questioning, Mendelson denied knowing what

work the invoices represented and did not concede that they represented political contributions. He stated that he had initialed the documents under instructions from Trap Rock's president without being aware of what the payments represented.

Interspersed with this examination were several sidebar conferences at which defense counsel claimed that the government had in its possession additional invoices and related documents from other advertising firms to Trap Rock which represented political contributions, and demanded that the government produce them as *Brady* material.[17] Several additional documents were thus produced the following Monday, and were admitted into evidence as defense exhibits 24-27, 30-31, and 33-37. Some of these documents showed expenditures by three advertising firms for political campaigns during 1969, and others were invoices by the same firms to Trap Rock during that period. Defense counsel resumed his cross examination of Mendelson, but terminated it after a short while. The only additional documents about which the witness was asked were another invoice and related documents from the O'Mealia Outdoor Advertising Corporation that had been

17. Technically speaking, the government did not produce the documents. Although they were in the government's possession, and would have been produced by government counsel, defense counsel objected that the documents alone, without any accurate explanation of what the payments actually represented, would not help him. In the interest of expediting an already lengthy trial, the Court accommodated defense counsel by issuing subpoenas to the advertising firms in question, directing them to produce the documents in question the following Monday morning and to have someone present in court who could explain what the payments represented. Nevertheless, for the sake of this discussion, I will assume that the government produced the documents in question.

initialed by Mendelson, and had been admitted into evidence as defense exhibit 24. The witness maintained his position of the previous Friday that he was aware of no political contributions made by Trap Rock through advertising firms other than those that were made through Writers Associates. Defendant now argues that the late production of defense exhibits 24-27, 30-31, and 33-37 so impaired his cross examination of Mendelson as to amount to a denial of due process.

The defendant is mistaken that the documents in question are *Brady-Giglio* material. They do not reflect any conflict with Mendelson's testimony on direct examination with respect to his dealings with the defendant. Furthermore, although the documents do suggest that Trap Rock made political contributions through advertising firms other than Writers Associates, they do not conflict with Mendelson's statement on cross-examination that he was unaware of any such other contributions. *Cf.* United States v. Polisi, 416 F.2d 573 (2d Cir. 1969) (non-disclosure of FBI report containing statement of one government witness, who did not testify at defendant's trial, that was in clear conflict with trial testimony of another government witness with respect to the defendant's role in a series of robberies, held to violate *Brady*). Accordingly, the government was not obligated to turn the documents over to the defense.

Moreover, the defendant was not prejudiced by the timing of his receipt of the documents in question. Those documents were cumulative and corroborative of other documents which defense counsel had in his possession prior to trial and which he used as the basis of a thorough cross-examination on Friday

afternoon. In addition, he had ample opportunity to cross-examine Mendelson on Monday with respect to all of the documents which he had received that morning, but chose not to do so. In short, defendant's opportunity to challenge Mendelson's credibility was not in the least impaired by the timing of his receipt of any documents in this case.

Defendant's timeliness argument with respect to the other documents can be disposed of summarily. His contention with respect to the letter to Arthur S. Kaplan is that it should have been produced because it corroborated the defense theory that there was no unlawful intent on the part of the defendant throughout all of the activity that formed the basis of this case, as evidenced by the fact that there was no attempt to conceal the solicitation of political contributions through fictitious invoices from advertising firms. His argument with respect to the Writers Associates documents is similar; the fact that a list of contributors was maintained by that firm and that the names of contributors were listed on deposit slips would have corroborated the contention that the entire operation was open and not fraudulent. The short answers to these arguments are that the Kaplan letter and the list of contributors were produced and presented to the jury, and that there is no evidence to rebut the government's denial that it possessed the deposit slips. In addition, to the extent that the defendant argues that he should have possessed the Kaplan letter at the time he initially cross-examined Kaplan and Bellante, and that he should have had the list of contributors at the time he cross-examined Smith, those documents do not conflict with the testimony of any of those witnesses and thus could not have been used to impeach their

testimony. Indeed, the list of contributors merely corroborated the testimony of Smith. Moreover, defense counsel recalled Bellante and questioned him concerning the Kaplan letter. Finally, and most important, the documents are not *Brady-Giglio* material and were not required under those cases to be turned over to the defendant in the first place. Not every shred of evidence in the government's files that may have been of possible use to a defendant because it happens to appear consistent with one of his theories falls under *Brady*, nor is the government obliged to anticipate the various defense theories that might develop in a case and comb its files for all documents that happen to be consistent with those theories.

2. The Authority of the United States Attorney

The defendant maintains that because the Assistant United States Attorney for the District of New Jersey who prosecuted this case, Bruce I. Goldstein, was not properly authorized to represent the government in this district the trial was a nullity and he must be retried. Specifically, he argues that the governing statute, 28 U.S.C. § 515, was not complied with in two respects: (a) the letter appointing Mr. Goldstein a Special Assistant to the United States Attorney for the Middle District of Pennsylvania was not specific enough, and (b) Mr. Goldstein failed to take the oath required by law prior to the commencement of the defendant's trial before this Court.

With respect to the argument concerning the letter of authorization, the short answer is that the defendant failed to raise any question with respect to the authorization of the

government's attorney until the filing of the instant motion, which was long after the completion of the eight-day trial in this case. He is thus deemed to have waived any objection to the authority of the attorney who actually prosecuted the case for the government. *See* Home News Publishing Company v. United States, 329 F.2d 191, 193 (5th Cir. 1964). In any event, the letter in question does contain the degree of specificity required by the statute and the cases cited by the defendant. The letter is dated November 29, 1974, and provides that Mr. Goldstein has "been appointed for a period not to exceed three weeks. This appointment expires January 1, 1975." Bearing in mind that the letter was written shortly after the venue of defendant's case was transferred from the District of New Jersey to this district and shortly before the defendant's trial was to commence before this Court, it can be fairly inferred that Mr. Goldstein's authority in this district was limited to the prosecution of the defendant's case.[18] The fact that the letter of authorization did not specifically mention the defendant's case is not in the least persuasive to the contrary. Finally, the cases cited by the defendant in which appointments under 28 U.S.C. § 515 were found to be insufficiently specific involved the participation of unauthorized persons in grand jury proceedings. They simply are not apposite to this case, a trial in which there was a transfer of venue upon the defendant's motion, and the same attorneys who represented the parties in the original forum continued to represent them in this one.

With respect to Mr. Goldstein's taking of the oath, the fact is that he took the oath called for by 28 U.S.C. § 515 on

18. In point of fact Mr. Goldstein's actions in this district were so limited, and were completed on December 11, 1974.

December 11, 1974, shortly after the jury returned its verdict. The defendant argues, without citation of any pertinent authority, that this was too late to confer validity on the proceedings, and that, accordingly, they are null and void. I simply am not persuaded by defendant's technical argument concerning a requirement that seems at best a formality, and therefore reject it.

3. The Immunity of Government Witnesses

The defendant next argues that the manner in which the government employed the fact that four of its witnesses testified under prior grants of immunity so prejudiced him as to require a new trial. Specifically, he maintains that the manner in which these witnesses were questioned on direct examination concerning their immunity, as well as the government attorney's discussion of immunity in his opening and closing arguments to the jury, constituted prejudicial error in three respects: (a) it implied defendant's guilt by association with these witnesses; (b) it improperly implied a prior trial of defendant; and (c) it improperly bolstered the credibility of the government witnesses. These contentions are without merit.

At the outset, it is noted that the defendant failed to object during the trial to either the government attorney's discussion of immunity in his opening and closing arguments, or to the manner in which he examined the witnesses concerning their immunity. Hence, these actions must constitute "plain error" in order for a new trial to be ordered on their account. Rule 52(b), Fed. R. Crim. P. The "plain error rule . . . is appropriate . . . in

exceptional cases to preserve grave miscarriages of justice or to preserve the integrity of judicial proceedings." United States v. Carter, 401 F.2d 748, 750 (3d Cir. 1968). It is clear that the plain error rule is inappropriate here.

Moreover, the government attorney's handling of the immunity issue in this case was entirely proper. To begin with, it is undisputed that it is appropriate for the government to elicit on direct examination a witness's prior grant of immunity. United States v. Silverman, 430 F.2d 106, 124-125 (2d Cir. 1970). Indeed, failure to disclose that a witness is immune from prosecution may under certain circumstances amount to a denial of due process. Giglio v. United States, 405 U.S. 150 (1972). More important, the actual handling of the issue was not improper. In his opening argument to the jury, the government attorney explained to the jurors that a witness testifying under a grant of immunity is required to testify and may not claim his Fifth Amendment privilege which he might otherwise have a right to invoke; that the immunity statute provides that such a witness may be prosecuted for perjury if he testifies improperly; and that some of the government witnesses in this case would be testifying under grants of immunity. A fair reading of his statements reveals that their primary purpose was to caution the jury not to be prejudiced against the government's case because some of the witnesses had been immunized. (N.T., Vol. II, pp. 166-168). In his closing argument, the government attorney asked the jurors to consider the fact that certain witnesses had received immunity in evaluating their credibility. This was entirely proper, as a jury may consider the fact that a witness has been immunized in evaluating his credibility. United States v.

Silverman, 430 F.2d 106, 124 (2d Cir. 1970). Finally, in his questioning of each of the immunized witnesses, the government attorney reminded the witness that he had received immunity in a prior proceeding earlier in the year; that the presiding judge in that prior proceeding had advised him that if he did not testify truthfully he could be prosecuted for perjury; and that those same principles applied in the instant trial.[19] There was nothing improper in any of this, and the arguments and cases advanced by the defendant are not persuasive to the contrary. The cases cited in support of the contention that the government used the immunity of its witnesses to create guilt by association all involve prosecutors who placed an unimmunized witness on the stand, knowing that he would validly invoke the privilege against self-incrimination. *See, e.g.,* United States v. Tucker, 267 F. 2d 212, 215 (3d Cir. 1954). They do not apply here. The argument that "the mention of prior proceedings both in the

19. The questioning of Mendelson is illustrative:

"Q Mr. Mendelson, you have testified in prior proceedings before the United States District Court; have you not?

"A Yes, I have.

"Q Prior to your testimony you were, sir, compelled to testify by Judge Whipple pursuant to a grant of immunity; were you not, sir?

"A Yes, sir.

"Q On that occasion did he advise you that you had to testify pursuant to that grant of immunity but that you had to testify truthfully?

"A Yes.

(Cont'd)

questioning of the witness as to immunity and at other times alllowed an improper and untrue inference of a prior guilty verdict in the instant case. . ." (Defendant's Brief, at 131) is untenable. Indeed, the government attorney informed the Court at oral argument on the instant motions that he intentionally used the term "prior proceedings" in order to avoid an intimation that there had been a previous trial in this case. Finally, the contention that the government used immunity to improperly bolster the credibility of its witnesses is without merit. It overlooks the facts that the immunization of a witness can work both ways with respect to his credibility and, once again, that it is proper for a jury to consider such immunity in evaluating the credibility of a witness. United States v. Silverman, 430 F. 2d 106, 124 (2d Cir. 1970).

(Cont'd)

"Q Do you recall that?

"A Yes.

"Q Do you recall that he further advised you, Mr. Mendelson, that if you did not testify truthfully you could be prosecuted for perjury?

"A Yes.

"Q Do you recall that?

"A Yes.

"Q Do you understand the principles Judge Whipple laid down on that occasion apply today before Judge Nealon?

"A Yes, I do."

N.T. Vol. V, pp. 5-6.

4. The Instructions to the Jury

The defendant argues that certain errors in the Court's instructions to the jury mandate a new trial. Specifically, defendant maintains (a) that the Court should have specifically and explicitly instructed the jury not to consider the evidence with respect to the seven counts in the indictment as to which a judgment of acquittal was directed at the close of the government's case; and (b) that the Court's failure to instruct in accordance with four of the defendant's requests for instruction constituted error.

The defendant's argument with respect to the dismissed counts is that a specific instruction to the jury that they should disregard the evidence pertaining to those counts was necessary to prevent the jury from considering that evidence, and that, in the absence of such an instruction, juror confusion and prejudice was inevitable because of the large volume of evidence in this case. The immediate reaction to this contention is that the defendant failed to request such a specific instruction of the Court, and did not object to the portion of the charge that dealt with the evidence that the jury could properly consider during its deliberations. Hence, he is precluded from assigning that portion of the charge as error. Rule 30, Fed. R. Crim. P.

In point of fact, moreover, the defendant was not actually prejudiced by the evidence pertaining to the dismissed counts. Defendant offers no evidence of actual confusion or prejudice on the part of the jury, nor does he point to any particular item of

evidence as being confusing or prejudicial. In addition, it is not reasonable to conclude that the jury was confused or prejudiced during its deliberations by the evidence concerning the dismissed counts. As the result of a stipulation by counsel regarding what evidence would accompany the jury during its deliberations, no documents with respect to the dismissed counts accompanied the jury when it retired to deliberate. And the Court's instructions were more than adequate to obviate any confusion or prejudice as a result of the numerous counts and voluminous evidence in this case. The Court stated in pertinent part:

> "In deciding this case, members of the jury, you are to consider each count individually. The fact that the Government has proved its case beyond a reasonable doubt or has failed to prove its case beyond a reasonable doubt as to any single count does not in and of itself require a finding of either guilty or innocent as to any other count. It is your obligation and duty to consider each count individually and arrive at a separate finding of guilty or innocent as to each of the four counts in the indictment. And as to each count you are to determine guilt or innocence only on the evidence that applied to that particular count."

N.T., Vol. VIII, p. 18.

The arguments with respect to the failure to instruct in accordance with the defendant's requests can be dealt with

summarily. The first is that the Court should have instructed the jury that, in order to find the defendant guilty, they had to find that he caused deductions to be overstated in a substantial amount. The law with respect to 26 U.S.C. § 7206(2) does not support such a requirement. The amount of tax benefit to the taxpayer in a Section 7206(2) case is irrelevant. Edward v. United States, 375 F. 2d 862, 865 (9th Cir. 1967). It is the defendant's participation in the falsity of a return, and not the tax liability of the taxpayer, that is crucial in a Section 7206(2) case.

The defendant next argues that the Court should have instructed that under some circumstances political contributions are deductible as ordinary and necessary business expenses. He maintains that the failure to so instruct withdrew from the jury the defense theory of a lack of willfulness on defendant's part because of his belief that political contributions were deductible. The quick answer to this argument is that the Court instructed the jury that "the Government must prove beyond a reasonable doubt that [the defendant] knew and believed political contributions were not deductible." N.T., Vol. VIII, pp. 35-36. Thus, the defendant's theory with respect to willfulness was submitted to the jury. Furthermore, the instruction requested by the defendant was not relevant to this case. The defendant was not charged with or convicted of assisting others to deduct political contributions listed as such on their tax returns, but with having caused political contributions to be misrepresented on tax returns as ordinary and necessary business expenses for advertising and public relations services. *Cf.* Stern v. United States, 436 F.2d 1327 (5th Cir. 1971), where the taxpayer

forthrightly stated in her gift tax return that she had made political contributions which she did not consider taxable under the gift tax statutes. *Id.*, at 1328-1329. The defendant's request in this regard was properly rejected.

Finally, the defendant maintains that the jury should have been instructed that they could find him guilty only if they found that he had participated in the actual preparation and filing of the tax returns, and that the Court improperly instructed the jury with respect to willfulness. Both contentions are meritless. As discussed previously, participation in the actual preparation and filing of a tax return is not an essential element of a Section 7206(2) violation. The jury was properly instructed that:

> "You need not find that the defendant took any part in the actual preparation or presentation of the tax return. The United States need only prove that the defendant knew or believed that when the return was filed it would be false or fraudulent in that it would contain a political contribution which would be wrongfully deducted."

N.T., Vol. VIII, p. 35. In addition, the jury was properly instructed with respect to the element of willfulness. The Court charged:

> "In order to find that an act was done willfully by this defendant, you must find beyond a reasonable doubt that it was done voluntarily

> and intentionally and with a specific intent to do something the law forbids. That is to say, with bad purpose either to disobey or disregard the law."

N.T., Vol. VIII, p. 33. *See* United States v. Malinowski, 472 F. 2d 850, 853 (3d Cir. 1973); United States v. Klee, 494 F. 2d 394, 395 (9th Cir. 1974), cert. denied, ____ U.S. ____ (1975).

The defendant's final arguments have already been disposed of. One is that this Court should have ordered discovery as to the knowledge of the United States Attorney's Office of the District of New Jersey as to the imminence of public statements made by the Attorney General of the State of New Jersey during defendant's first trial in the District of New Jersey. This contention was rejected by this Court in an opinion and order filed March 6, 1975, and is again rejected for the reasons in that opinion. The final argument relates to the collateral estoppel argument in support of the motion for acquittal. It is that it was improper for the defendant to be convicted of aiding and assisting in the preparation of false or fraudulent income tax returns when he was charged with such aiding and assistance in furtherance of a conspiracy, and that the deletion of the phrase "pursuant to the plan and purpose to commit the crime set forth in Count I of this indictment" from the indictment that was submitted to the jury was an improper amendment of the indictment. As discussed *supra*, the phrase in question was not an essential element of the offense with which the defendant was charged, and was properly removed from this indictment as

Appendix G

surplusage. The offenses for which the defendant was convicted were identical to those with which he was charged in Counts III, IV, X and XI of the indictment.

In accordance with the above, the motions will be denied.

s/ William J. Nealon
United States District Judge

Dated: May 13th, 1975

APPENDIX H — ORDER DATED MAY 13, 1975

ORDER

Now, this 13th day of May, 1975, in accordance with the memorandum this date filed, defendant's motions for judgment of acquittal and a new trial are denied.

s/ William J. Nealon
United States District Judge

Supreme Court, U. S.
FILED
MAY 21 1976
MICHAEL RODAK, JR., CLERK

No. 75-1323

In the Supreme Court of the United States

OCTOBER TERM, 1975

JOSEPH M. MCCRANE, JR., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT .

BRIEF FOR THE UNITED STATES IN OPPOSITION

ROBERT H. BORK,
Solicitor General,

SCOTT P. CRAMPTON,
Assistant Attorney General,

CROMBIE J.D. GARRETT,
RICHARD B. BUHRMAN,
Attorneys,
Department of Justice,
Washington, D.C. 20530.

INDEX

Page

Opinions below 1

Jurisdiction 1

Questions presented 1

Statement 2

Argument 5

Conclusion 10

CITATIONS

Cases:

Brady v. *Maryland,* 373 U.S. 83 ..... 4-5, 6, 9

Bruton v. *United States,* 391 U.S. 123 7

Davis v. *Alaska,* 415 U.S. 308 7

Fried v. *United States,* 486 F.2d 201, certiorari denied, 416 U.S. 983 ..... 6, 7

Giglio v. *United States,* 405 U.S. 150 ..... 5, 9

United States v. *Agurs,* 510 F.2d 1249, certiorari granted, November 11, 1975, No. 75-491 10

United States v. *Badalamente,* 507 F.2d 12, certiorari denied, 421 U.S. 911 6

United States v. *Banks,* 383 F. Supp. 389 10

United States v. *Gerard,* 491 F.2d 1300 10

United States v. *Harris,* 462 F.2d 1033 10

United States v. *Keogh,* 391 F.2d 138 8

United States v. *Miller,* 411 F.2d 825 8

United States v. *Ott,* 489 F.2d 872 8

Page

United States v. *Pfingst*, 490 F.2d 262, certiorari denied, 417 U.S. 919 8

United States v. *Sperling*, 506 F.2d 1323, certiorari denied, 420 U.S. 962 6

Constitution and statute:

United States Constitution, Fourth Amendment 9

26 U.S.C. 7206(2) 2

In the Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-1323

JOSEPH M. McCRANE, JR., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. E) is reported at 527 F.2d 906. The opinion of the district court (Pet. App. G) is not reported.

JURISDICTION

The judgment of the court of appeals (Pet. App. F) was entered on December 18, 1975, and a petition for rehearing was denied on January 15, 1976 (Pet. App. D). On February 4, 1976, Mr. Justice Brennan extended the time for filing a petition for a writ of certiorari to March 15, 1976, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the prosecution's failure to disclose information affecting the credibility of a witness who

testified solely with respect to two counts of the indictment entitles the defendant to a new trial on other counts based on independent evidence not affected by the testimony or credibility of that witness.

2. Whether the proper remedy for a breach of the prosecution's obligations of disclosure is dismissal of the charges rather than a new trial.

STATEMENT

After a jury trial in the United States District Court for the Middle District of Pennsylvania,[1] petitioner was convicted of four counts of aiding the preparation of fraudulent income tax returns, in violation of 26 U.S.C. 7206(2), and was fined $5,000 on each count. Imposition of sentence of imprisonment was suspended, and petitioner was placed on concurrent terms of three years' probation on each count.

1. The evidence showed that in his capacity as finance chairman for a successful New Jersey gubernatorial campaign, petitioner devised a scheme in which willing donors could claim an unwarranted federal income tax deduction by disguising their political contributions as ordinary and necessary business expenses. Petitioner arranged for two complaisant public relations firms to act as conduits by issuing fictitious invoices for advertising services to selected contributors (Pet. App. 8a-10a). The donors then funnelled their contributions through these intermediaries as apparent consideration for services that were never performed (*ibid.*). Petitioner advised the

[1]Petitioner was tried initially in the United States District Court for the District of New Jersey, but that court declared a mistrial because of juror misconduct (Pet. App. 8a n. 1). A second trial was commenced in that court but ended prematurely when petitioner's motion for a change of venue was granted and the case transferred to the Middle District of Pennsylvania.

contributors to use the false documentation to justify the deduction of these "business expenditures" on their tax returns (Pet. App. 17a).

Count III of the indictment charged petitioner with having aided the filing of a false income tax return by Hialeah Race Course, Inc. On two occasions in 1969, petitioner caused an advertising agency to send Hialeah an invoice in the amount of $1,000 even though he knew that the agency had performed no services for the company (Pet. App. 17a, 35a). Petitioner, then Vice-President and General Manager of Garden State Racing Association, which owned a controlling interest in Hialeah, gave express instructions that the fictitious invoices be paid (Pet. App. 17a, 35a). The agency subsequently received two $1,000 checks from Hialeah, and, at petitioner's direction, the proceeds were used for campaign expenses. Hialeah deducted these political contributions as ordinary and necessary business expenses on its federal income tax returns (Pet. App. 9a, 17a, 35a).

Count IV of the indictment charged petitioner with having aided Trap Rock Industries, Inc., in filing a false income tax return. In order to solicit a substantial political contribution from Trap Rock, petitioner advised Mendelson, its general manager, that he would furnish fictitious invoices that would enable the corporation to deduct the contribution as a business expense for federal income tax purposes (Pet. App. 17a, 35a-36a, 39a, 53a). Petitioner knew that the advertising agency that furnished the invoices and received the money had not performed the services reflected on those invoices (Pet. App. 36a). Trap Rock paid the invoices with two checks, the proceeds of which were used for campaign expenses. It subsequently deducted the contribution as an ordinary and necessary business expense on its federal tax return (Pet. App. 17a, 36a). The district court noted that Mendelson's

credibility was crucial to the government's case on this count (Pet. App. 53a).

Counts X and XI of the indictment charged petitioner with having aided the filing of two false income tax returns by the firm of Bellante, Clauss, Miller & Nolan, Inc., which pleaded guilty to separate charges of filing knowingly false income tax returns. E. Lawrence Bellante, president of that firm, was the government's principal witness on these charges. He testified before the grand jury and at trial pursuant to a grant of immunity. He stated that petitioner solicited two campaign contributions from him, arranged for the transmission of fictitious covering invoices from the advertising agencies, and counseled him to deduct the payments as ordinary business expenses (Pet. App. 9a, 36a). He also testified that the Bellante firm had deducted these contributions as business expenses for federal income tax purposes, despite his knowledge that the agencies had performed no services for his company (*ibid.*).

Bellante's testimony did not advert in any way to the separate contributions by Hialeah or Trap Rock or the preparation of their falsified federal income tax returns, the subject matter of Counts III and IV.

2. Shortly after his conviction, petitioner moved for a new trial on all counts, alleging that he had learned after the trial of the existence of certain letters written on Bellante's behalf by the United States Attorney. These letters explained the relationship between that office and Bellante and his firm to several of its current or prospective public authority clients. Petitioner contended that, had he been able to utilize these letters at trial, he could have impeached Bellante's credibility by showing that his testimony was influenced by preferential treatment received from the government. He argued that the prosecution's failure to disclose this impeachment evidence required a new trial on all counts under *Brady*

v. *Maryland*, 373 U.S. 83, and *Giglio* v. *United States*, 405 U.S. 150.

The district court found that the letters were neither "favorable" to petitioner nor material under the standard set forth in *Giglio*, but merely contained factual recitations of the status of Bellante and his firm (Pet. App. 50a-51a). Accordingly, it denied all relief. The court of appeals affirmed petitioner's convictions on Counts III and IV but reversed his convictions on the charges involving the Bellante firm's tax returns and remanded those counts for a new trial (Pet. App. 19a). It found that the letters were "favorable" to petitioner for *Brady* purposes and that, in the particular context of Bellante's cross-examination, the letters might have been important to the jury in evaluating his motives for testifying for the government (Pet. App. 14a). Concluding that the letters were reasonably likely to have affected the jury's verdict, the court of appeals held that under *Giglio*, the prosecution's failure to disclose the letters to the defense necessitated a new trial "on the affected counts" (Pet. App. 8a).[2] However, the court upheld petitioner's convictions on Counts III and IV, which it implicitly found were not affected by Bellante's testimony or the jury's assessment of his credibility (Pet. App. 10a, 15a).

ARGUMENT

1. Petitioner contends (Pet. 10-11) that the court of appeals erred in not vacating and remanding his convictions for aiding the preparation of false income tax returns by Hialeah and Trap Rock. In essence, he challenges the court's factual determination that his convictions

---

[2]The United States has filed a petition for a writ of certiorari seeking review of the court of appeals' award of a new trial on these two counts. *United States* v. *McCrane*, No. 75-1464, filed April 12, 1976.

on Counts III and IV were not affected by the prosecution's failure to disclose evidence possibly impeaching Bellante's credibility. However, the court of appeals' decision is manifestly correct and does not warrant further review.

Under the materiality standard embodied in the *Brady* rule, the determination whether nondisclosed evidence could in any reasonable likelihood have affected the judgment of the jury must be made as to each defendant individually and on each separate count of which he was convicted. See *Fried* v. *United States,* 486 F.2d 201 (C.A. 2), certiorari denied, 416 U.S. 983; *United States* v. *Sperling,* 506 F.2d 1323 (C.A. 2), certiorari denied, 420 U.S. 962; *United States* v. *Badalamente,* 507 F.2d 12 (C.A. 2), certiorari denied, 421 U.S. 911.

The record shows that the contributions underlying Counts III and IV were solicited from companies that were not in any way affiliated with Bellante's firm. Bellante's testimony provided no information concerning petitioner's communications with those contributors, the provision of fraudulent covering documentation to them by the advertising agencies, or petitioner's complicity in the preparation of those firms' fraudulent income tax returns. Indeed, the evidence showed that petitioner himself knowingly directed that payments be made on the fictitious invoices giving rise to Count III. Nor has petitioner alleged that Bellante's testimony in any way bore upon his solicitation of the contribution from Mendelson of Trap Rock. Therefore, the record clearly demonstrates no reasonable likelihood that further impeachment of Bellante's credibility, no matter how effective, could have influenced petitioner's convictions on Count III and IV.[3]

[3]Whether petitioner engaged in a common course of conduct in soliciting these contributions is irrelevant to his conviction for these substantive offenses. All the necessary elements of the offenses charged in Counts III and IV were sufficiently established by evidence of petitioner's communications with the officers of those companies (Pet. App. 17a-18a). Any showing of a common scheme was mere surplusage after the dismissal of the conspiracy count; thus, even if petitioner had refuted the existence of a common scheme, his convictions on these charges would nonetheless stand. Moroever, contrary to petitioner's assertion (Pet. 12, 14), additional evidence impeaching Bellante's credibility would not have affected the proof showing the circumstances under which he solicited the other, independent contributions.

Similarly, since Bellante's testimony did not provide any link in the chain of proof against petitioner on Counts III and IV, his inability to impeach Bellante fully on cross-examination did not affect his right of confrontation. See *Davis* v. *Alaska,* 415 U.S. 308, 317.

Since the charges relating to the Hialeah and Trap Rock tax returns were established by proof wholly independent of Bellante's testimony, they remain untainted by the prosecution's failure to disclose information arguably impeaching a witness who testified against petitioner on the other two counts. See *Fried* v. *United States, supra.* The trial court carefully instructed the jury that it must consider petitioner's guilt or innocence on each count individually.[4] There is no suggestion that the jury could not and did not follow that instruction. See *Bruton* v. *United States,* 391 U.S. 123, 135. Therefore,

[4]The court charged the jury as follows (Pet. App. 18a, 65a):

> In deciding this case, * * * you are to consider each count individually. The fact that the Government has proved its case beyond a reasonable doubt or has failed to prove its case beyond a reasonable doubt as to any single count does not in and of itself require a finding of either guilty or innocent as to any other count. It is your obligation and duty to consider each count individually and arrive at a separate finding of guilty or innocent as to each of the four counts in the indictment. And as to each count you are to determine guilt or innocence only on the evidence that applies to that particular count.

the court of appeals properly held that the nondisclosure of the United States Attorney's letters did not entitle petitioner to a new trial on those charges unaffected by Bellante's reliability as a witness.

2. Petitioner also contends (Pet. 15) that the prosecution's "deliberate, advertent suppression of this exculpatory evidence" entitles him to dismissal of the entire indictment, rather than retrial on the affected counts.

This argument is based entirely (Pet. 9) on the court of appeals' statement that "the prosecution chose to ignore the sage admonition of the pretrial judge and took it upon itself to decide a serious legal question adversely to the defendant" (Pet. App. 15a). However, as we stated in our separate petition for a writ of certiorari in this case (*United States* v. *McCrane,* No. 75-1464, p. 17), this characterization of the prosecution's behavior is improper. The concept of "deliberate suppression" implies an element of willfulness or a conscious obstruction of the defense. See *United States* v. *Ott,* 489 F.2d 872 (C.A. 7); *United States* v. *Miller,* 411 F.2d 825, 832 (C.A. 2). If a prosecutor is aware of the existence of information in his files and decides in good faith that he is not required to disclose it, that decision should not be considered as a deliberate suppression of evidence. See, *e.g., United States* v. *Pfingst,* 490 F.2d 262 (C.A. 2), certiorari denied, 417 U.S. 919; *United States* v. *Keogh,* 391 F.2d 138 (C.A. 2). Since there was no hearing on petitioner's motion for a new trial, there is no support in the record for petitioner's assertion that the prosecution deliberately withheld this information.[5]

---

[5]There is no evidence of record, moreover, that the prosecutors ever consciously considered the question whether they had a duty to disclose the letters, let alone whether, if they did consider the question, it was determined in bad faith that disclosure should not be made.

Moreover, even if the prosecution's failure to disclose this evidence had been intentional, the decisions of this Court clearly demonstrate that the proper remedy for a *Brady* violation is not dismissal of the affected charges, but the award of a new trial at which all relevant evidence may be presented to the trier of fact. In *Giglio* v. *United States, supra,* the Court held that the government was chargeable with deliberately deceiving the jury by failing to correct false testimony critical to the credibility of a key government witness. Nevertheless, the court simply remanded the case for a new trial at which the impeachment evidence would be made known to the jury (405 U.S. at 154-155).

Brady v. *Maryland, supra,* established no broader principle. There, even after a specific defense request, the prosecution selectively failed to reveal exculpatory evidence which would have been crucial to the jury's consideration of the punishment properly to be imposed. This Court held that the decision of the Maryland courts limiting the scope of the retrial to the issue of punishment did not violate the defendant's federal constitutional rights.[6]

Similarly, the courts of appeals are in agreement that the proper remedy for *Brady* violation is not dis-

---

[6]By analogy to the enforcement of the Fourth Amendment's protections through the judicially-fashioned exclusionary rule, petitioner suggests (Pet. 17-18) that merely requiring a new trial at which the previously withheld information may be utilized is an insufficient deterrent sanction for *Brady* violations. However, this proposition contains its own refutation, for even under the exclusionary rule, the remedy for a violation of the defendant's consitutional rights is a new trial at which the illegally seized evidence cannot be introduced. This argument also answers petititioner's invitation (Pet. 20-21) to this Court to exercise its supervisory power over the administration of justice by imposing a stronger deterrent sanction in *Brady* cases than the Constitution requires.

missal of the entire indictment but vacation of the conviction on the affected charges and remand of the case for a new trial at which the trier of fact may exercise its judgment with all relevant evidence before it. See, *e.g., United States* v. *Agurs,* 510 F.2d 1249 (C.A. D.C.), certiorari granted, November 11, 1975, No. 75-491; *United States* v. *Gerard,* 491 F.2d 1300 (C.A. 9); *United States* v. *Harris,* 462 F.2d 1033 (C.A. 10). Thus, contrary to petitioner's assertion, *Brady* and its progeny do not require that this indictment be dismissed.[7]

3. The government's petition for certiorari (No. 75-1464) presents the question whether the court of appeals was correct in determining that the prosecution violated its duty of disclosure by failing to disclose the letters written on Bellante's behalf. This issue, which we believe to be a substantial one warranting consideration by this Court, is wholly independent of the issues presented by petitioner herein. Accordingly, should the Court be disposed to grant the government's petition, there is no need to hold or to grant the instant petition.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

ROBERT H. BORK,
Solicitor General.

SCOTT P. CRAMPTON,
Assistant Attorney General.

CROMBIE J.D. GARRETT,
RICHARD B. BUHRMAN,
Attorneys.

MAY 1976.

---

[7] The question whether a different principle would be appropriate in cases showing a consistent pattern of gross misconduct by the government (see *United States* v. *Banks,* 383 F. Supp. 389 (D. S.D.)) is not presented in this case.